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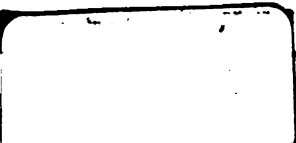
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REPORTS
OF
CASES DETERMINED
IN THE
SUPREME COURT
OF
DAKOTA TERRITORY

FROM FEBRUARY, 1888, TO FEBRUARY, 1889, INCLUSIVE.

BY ROBERT B. TRIPP, REPORTER.

VOL V.

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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

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HON. WILLIAM B. McCONNELL, ASSOCIATE JUSTICE.

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ROBERT B. TRIPP, REPORTER.

¹Appointed March 7, 1888, to succeed Mr. Justice PALMER, whose term had expired.

²Appointed July 19, 1883, to succeed Mr. Justice FRANCIS, whose term had expired.

³Appointed under the act of congress of August 9, 1888, giving the court two additional justices, and while they sat at the February term, 1889, they took no part in the decisions reported in this volume.

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**HANNAHER *et al.*, Respondents, v. ST. PAUL, MINNEAPOLIS & MAN-
ITOBA RAILROAD Co., Appellant.**

1. Railroads — Construction of Road — Liabilities for Surface Water.

In an action against a railroad company for overflowing land with surface water through alleged negligence in the construction of its road, it appeared that plaintiff, prior to the construction of the road, for a valuable consideration, had granted to the company the right of way over the premises for railroad purposes; that it had constructed the road in the usual and ordinary way under the circumstances, and with ordinary skill and precaution. *Held*, that the plaintiff had no right of action.

2. Same—Instructions—Invading Province of Jury.

In an action against a railroad company for damages in overflowing land with surface water through alleged negligence in the construction of its road, where the plaintiff, for a valuable consideration, had granted the company the right of way over the premises, the court instructed the jury a recovery could not be had for ordinary damages, but the damage caused, if any, by the discharge of large and unusual quantities of waters from other lands, if such occurred, would not be ordinary damage. *Held* error in determining by the court what is ordinary damage, and giving the jury to infer that, while the company might not be liable for ordinary, it would be for extraordinary, damage caused by the construction of the road over the premises.

(Argued February 5, 1887, reversed February 16; opinion filed February 7, 1888.)

V.5 DAK.—1

Appeal from district court of Cass county; Hon. W. B. McCONNELL, Judge.

J. King and Wilson, Ball & Wallin, for appellant.

The plaintiffs charge negligence. The defendant contends that it does not appear that the building of the railroad caused the alleged damage to plaintiffs' property; but if it should be shown that the damage was the result of building the railroad properly, and with due care, that an action will not lie for such damage. Defendant submits that it has an undoubted right, by virtue of its corporate franchises, to build a line of railroad upon its own land, provided that the road is built properly, and with due care.

In the case at bar the defendant claims that the overwhelming weight of testimony shows that defendant's line of road, including embankment, ditches, and culverts, was built with due care, and in the usual, and, in fact, the only proper manner yet discovered of constructing a railroad through flat and level regions, such as those under consideration.

The testimony shows that whatever injury or damage the plaintiffs may have suffered from the overflows of water in the years 1881 and 1882 was the direct consequence of unusual, excessive, and continued rains occurring in those years, which caused floods of surface water to accumulate, stand upon, and flow over extensive bodies of land situated in the vicinity of plaintiff's land, and not affected in any way by the railroad, but was the result of natural causes.

It is elementary that no action will lie for "lawful acts lawfully done, though some actual hurt or loss result to some person therefrom." 1 *Suth. Damages*, 3, 4; *Cooley, Torts*, 688. See, also, page 81.

The defendant's right of way was acquired by purchase of the plaintiffs.

"The consideration of the deed is deemed to stand in the place of the damages which would have been assessed by commission-

ers acting under the statute, and is understood to embrace compensation for all damages reasonably to be expected to flow from the construction and maintenance of the work, if done in a proper manner, and without negligence." 1 Thomp. Neg. 570. See, also, page 569, and authorities cited in note 2.

The court erred in its instruction with reference to the discharge of unusual quantities of water, if any, upon the plaintiff's land. It distinctly informs the jury that if the proper construction of the embankment resulted in damaging plaintiff's land, by causing large and unusual quantities of water to be discharged upon it, that such damages would not be ordinary damages arising from the proper construction of the embankment.

We have shown, and it is well settled, that the defendant acquired, by its deed of conveyance, all rights which could be acquired by a statutory condemnation, and that as to such damages and injuries as are taken into account and compensated for by statutory proceedings, no common-law action will lie. See, also, *Pierce, Railroads*, 177.

Section 452, C. C., is very broad, and invests the commissioners with plenary powers with respect to awarding damages to the land-owner whose land is taken for railroad purposes.

Under similar statutes it has been generally held by the courts that the sum awarded the land-owner by the commissioners is a full compensation to him for any damages resulting from the proper construction of the railroad over his lands; but, on the other hand, such award does not include damages resulting from want of care or negligence in the construction of the road. *Wood, R. R. L.* pp. 795, 796, § 245.

The liability of throwing an unusual quantity of water upon lands adjoining a railroad embankment, and constructed over low and flat lands, would be considered and paid for in an award by commissioners, and consequently no action will lie for such damages. 44 Mich. 222; *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10; cited with approval, 28 Minn. 510.

The instruction is open to the further objection that it in-

vades the province of the jury as to the main question, i.e., that of causing damage by negligence.

Consideration of the charge of the trial court necessarily involves a discussion of the rights of individuals and corporations with respect to surface water.

"Every man has a clear legal right to protect his premises against the fall of rain or snow, even though incidental injury may result to his neighbor in consequence." Cooley on Torts, 574; *Goodale v. Tuttle*, 29 N. Y. 466; *Barkley v. Wilcox*, 86 N. Y. 140; *O'Conner v. Fond du Lac, A. & P. R. Co.*, 52 Wis. 526, 9 N. W. Rep. 287; *Cannon v. Hargadon*, 10 Allen, 106; *O'Brien v. City of St. Paul*, 25 Minn. 331.

It will be claimed that the supreme court of Minnesota has reversed itself in *Hoganon's Case*, 31 Minn. 226, 17 N. W. Rep. 374. We think otherwise. The latter case had to do with the question of tapping a reservoir of water, and conveying it out in the country by a canal-like ditch, three and a half miles in length, and is not a case similar in its facts to the *O'Brien Case*, nor to the case at bar.

We concede that the adjudications upon the right to dispose of surface water are not harmonious. 2 Wood, R. L. 886. Nevertheless few, if any, decisions can be found which have mulcted a railroad company in damages for using its side ditches and culverts, properly placed and constructed, as a means of preventing its embankments from destruction by rain. To deny this privilege would be equivalent to suspending railroad building in low and flat sections of country.

Negligence did not cause the water to be collected and discharged upon the land, and, the plaintiffs having failed to prove their complaint, the court ought to have directed the verdict.

C. A. Pollock and Stone & Newman, for respondents.

While it is not claimed by respondents that the railroad company did not construct a proper embankment, ditches, and culverts for railroad purposes, it is contended that they did so

negligently construct such embankments, ditches, and culverts as to cause large quantities of surface water to accumulate in such ditches from large tracts of surrounding country, and to be conducted to and discharged upon the lands of the respondents in large and unusual quantities, and with great force, and in a manner entirely different from the manner in which surface water formerly found its way to respondents' lands.

Respondents do not complain that by reason of the embankment of appellant the surface water which usually fell or accumulated upon their lands was prevented from flowing off in its usual course, but they do complain that large quantities of such water which had never before found its way to their lands were collected from the surrounding lands, and were by means of these ditches and culverts, and their negligent construction, conducted to and discharged upon their lands in large streams, and in quantities and manner entirely unusual, and that by the exercise of ordinary care and skill in the construction of its road-bed, ditches, and culverts, the appellant might have entirely prevented this large and unusual flow of surface water to respondents' lands and the consequent injury.

It is claimed by appellant that the right exists in it to use its own property in its own way, without reference to the property of adjacent owners, and that it is under no obligation to make any provision whatever for the disposition of any surface water which may fall or collect upon or pass over the lands through which its road is built.

We do not question the principle that the appellant is the owner of all surface water which may fall or stand upon its land, or flow over or under its surface, which does not form any definite stream. Such is the rule declared by the C. C. § 255.

This surface water is the property of appellant, and in its management and disposition it must exercise the same care that it is required to exercise in the management and disposition of any other property belonging to it. The rule defining the degree of care necessary to be observed by appellant is declared in section 979, C. C.

The owner of land may dig as deep or build as high upon it as he pleases, but in such digging or building he must use ordinary and reasonable care to protect adjacent property from unnecessary injury.

The rule adopted by the court below seems to us just, equitable, and in entire consonance with the provisions of the Code. It is much more favorable to appellant than that laid down in any of the cases. See *Boughton v. Carter*, 18 Johns. 405; *Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Foots v. Bronson*, 4 Lans. 46; *Wagner v. Long Island R. R. Co.*, 2 Hun, 685; *Jutte v. Hughes*, 67 N. Y. 267; *Bastable v. Syracuse*, 8 Hun, 587, S. C. 72 N. Y. 64; *O'Brien v. City St. Paul*, 25 Minn. 331; *Gould v. Booth*, 66 N. Y. 62; *Noonan v. Albany*, 79 N. Y. 476; *Vennun v. Wheeler*, 35 Hun, 54; *Mitchell v. New York, L. E. & W. R. R. Co.*, 36 Hun, 178; *Saal v. Abells*, 20 N. Y. Wkly. Dig.; *Pettigrew v. Village Evansville*, 25 Wis. 223, approved in *Hoyt v. Hudson*, 27 Wis. 656, and *O'Connor v. Fond du Lac, A. & P. R. R. Co.*, 52 Wis. 52, 9 N. W. Rep. 287; *Waterman v. Conn. & Pass. R. Ry.*, 30 Vt. 610; *White v. Chapin*, 12 Allen, 520; *Curtis v. Eastern R. R. Co.*, 98 Mass. 428; *Hoganon v. St. Paul, M. & M. Ry. Co.*, 31 Minn. 226, 17 N. W. Rep. 374; *Livingston v. McDonald*, 21 Ia. 160; 1 Western Jur. 12. We have no complaint to make of the rule of the cases cited by appellant from New York and Massachusetts. Their doctrine has been approved by cases like this cited by us from New York and Wisconsin.

Above we have not cited any cases from states which have adopted the more liberal rule of the civil law, preferring to confine our citations to states whose decisions are relied on by appellant. We refer the court, without quotation, to *Kauffman v. Griessmer*, 26 Penn. St. 407; *Martin v. Riddell*, 26 Penn. St. 315; *Laimier v. Francis*, 23 Mo. 181; *Butler v. Peck*, 16 Ohio St. 334; *Gilhaler v. Madison Ry. Co.*, 49 Ill. 484; *Nevens v. City of Peoria*, 41 Ill. 502; *Toledo & C. R. R. Co. v. Morrison*, 71 Ill. 610; *Gillingham v. Madison Ry. Co.*, 49 Ill.

484; *Gormley v. Sanford*, 52 Ill. 158; *Osborn v. Conner*, 46 Cal. 347; *Martin v. Jett*, 12 La. 502; *Bowman v. City of New Orleans*, 27 La. 501; *Delahousie v. Judice*, 18 La. 587; *Tillotson v. Smith*, 32 N. H. 90; *Bassett v. Salisbury Manuf'g Co.*, 43 N. H. 567; *Indianapolis v. Sawyer*, 38 Ind. 848; *Miller v. Pilgrim*, 7 Ill. 184; *Cairo v. Vincennes R. R. Co.*, 73 Ind. 278; *Templeton v. Vashlen*, 72 Ind. 184; *Adams v. Walker*, 34 Conn. 466; *Ashley v. Port Huron*, 35 Mich. 296; *Rhodes v. Cleveland*, 10 Ohio, 159; *Aurora v. Fillet*, 56 Ill. 132; *Same v. Reed*, 57 Ill. 29; *Miller v. Sambach*, 47 Pa. St. 154; *Cooley*, Torts, 574.

What would be ordinary care and skill must be determined by the surface and nature of the country through which the road was built, and the circumstances of the particular case, and is a question for the jury. *Waterman v. Conn. & Pass. Rivers R. R. Co.*, 30 Vt. 610, *supra*.

It is conceded that the rights of the appellant under its deed are the same as they would have been under condemnation proceedings, but it is bound to use the same care in the construction of its road. 1 Redf. Railways, (5th Ed.) § 61, subd. 5, and cases there cited. And neither compensation nor condemnation proceedings or voluntary conveyance will operate as a release of damages resulting to the lands of respondents from the improper or negligent construction of the road over their lands. 1 Rorer, Railroads, 405; *Ludlow v. Hudson River R. R.*, 6 Lans. 128.

The rule is that no action can be maintained for an injury resulting from the due, proper, and careful prosecution of the work authorized by law; and injuries arising from negligence, want of skill, improper construction of the work, or other wrong done by the corporation in or about the execution or maintenance of it, are not to be anticipated by the commissioners, but may be redressed if they happen, by an action. 1 Thomp. Neg. 569; *Wood, Ry. L.* § 208; *Smith v. New York & O. M. R. R. Co.*, 68 N. Y. 59; *Pflegar v. Hastings & D. Ry. Co.*, 28 Minn. 510, 11 N. W. Rep. 72; 2 *Wood, Ry. Law*, 885, note 1.

TRIPP, C. J. This is an action brought by the plaintiffs to recover damages for injury to their crops during the years 1881-82, by overflow of surface water, alleged to have been caused by the negligent construction of the road-bed, ditches, and culverts of the defendant railway company. The complaint substantially alleges that:

1. Defendant's railroad runs in a south-easterly and north-westerly direction upon a road-bed and embankment raised about two feet above the surrounding country.

2. That under its road-bed it constructed a culvert near to plaintiffs' land, which culvert connected with the ditch which was at the same time constructed by the defendant, and which extended along the west side of the embankment, and parallel with it, for several miles.

3. That prior to such construction the water falling or coming upon the land lying west, south-west, and north-west of plaintiffs' land for several miles ran its natural course towards the north-east, and away from plaintiffs' land, into coulees and depressions, and thence into the Red river, without coming on or injuring plaintiffs' land.

4. That defendant carelessly and negligently constructed said embankment, culvert, and ditch, and thereby caused large quantities of water to become dammed up on the west side of said embankment, and collected in said ditch, and diverted said water from its ordinary course, and caused it to be conducted through said culvert over and upon plaintiffs' land in large and unusual quantities.

5. That defendant also carelessly and negligently constructed a ditch on the east side of, and parallel to, its road-bed for several miles, in a south-easterly direction, and thereby caused large quantities of water from defendant's and other surrounding lands to be conducted and diverted through said ditch upon plaintiffs' land in large and unusual quantities.

6. That by reason of such negligent and improper construction plaintiffs' land was overflowed, and their crops destroyed.

The gist of the action is the negligent construction of the

embankment, ditches, and culvert described in the complaint.

The answer puts in issue the allegations of the complaint, and affirmatively alleges the proper construction of the road-bed, its embankments, ditches, and culverts.

The defendant before the trial moved for judgment upon the pleadings, and at the close of the case asked the court to direct a verdict for the defendant, which motion and request were denied, and exceptions duly taken. The defendant also asked certain instructions of the court to the jury, which were refused, to which exceptions were taken, and also numerous exceptions to the charge given to the jury by the court upon its own motion, all of which will be noticed more fully hereafter. Numerous other exceptions were taken at the trial, and were urged in this court, but will not be noticed in this opinion, and are not necessary to be considered in the view we have taken of this case.

A careful examination of the pleadings and evidence shows that the railroad ran in a south-easterly and north-westerly direction, intercepting the natural flow of surface water, which ran in a north-easterly direction, diagonally, or nearly at right angles; that the entire surface of the country is one extended plain or level, with no elevations or depressions of more than a few feet or inches; that there were no natural water-courses on or near the premises in controversy, or within reach of said right of way, into which such surface water could be drained; that the depressions, or coulees, through which the surface water reached, and was drained into, the Red river, were lower levels of the prairie, or depressions of the surface, having no defined banks or bed, but were filled and covered with the continuous grass of the prairie, though sometimes such grass was of the coarser and ranker variety than that which grew upon adjacent lands; and such depressions were usually dry, like the other portions of the prairie, except in times of high water or melting snows.

That the plaintiff, for a valuable consideration, conveyed to the defendant the right of way, for railway purposes, across the

premises alleged to have been overflowed, before the construction of the embankment, ditches, and culvert complained of.

While the gist of the action was the negligent construction of the embankment, ditches, and culvert in question, it seems to have been clearly established by the evidence, and to have been practically admitted at the trial, and it was admitted in this court, that the embankments, etc., complained of were properly constructed for railroad purposes. Counsel for respondents in his brief commences by saying: "It is not claimed by respondents that the railroad company did not construct a proper embankment, ditches, and culverts for railroad purposes;" but respondents claimed that the defendant should have so constructed its road that the surface water would not have flowed upon the premises in greater quantities, or in a different manner, from what it naturally was wont to flow, and that if by the construction of its embankments, ditches, and culverts, though constructed in the usual and ordinary manner, larger quantities of surface water were permitted to accumulate, and were discharged upon plaintiffs' land in an unusual manner, whereby they sustained injury, the defendant was liable in an action for damages for such injury.

The action was commenced as one of negligence for the carelessly and negligently doing of a lawful act,—the careless and negligent construction of its embankment, ditches, and culverts, which it had a lawful right to construct in a careful and proper manner; it ends in an action of trespass, or the doing of an unlawful act in an unlawful manner.

The theory upon which the action was commenced, and the theory upon which it was tried, are antagonistic, and cannot both be maintained upon the same state of facts. The act of constructing the embankment, etc., cannot be wrong and right at the same time. It was, or it was not, negligently constructed; and, if it was not negligently constructed, the plaintiffs' cause of action failed. In the court below the testimony on both sides was to the effect that defendant's railroad was constructed in the usual and customary manner; that the excavations at the

sides were the usual ones made to obtain earth to form the embankments, and were usual in size and extent; that the embankment was of the usual height in prairie countries, and the culverts were of the ordinary and usual size and number.

John D. White, an engineer of experience, called by the plaintiffs, testified as follows: "*Question.* Mr. White, what is the elevation of this road-bed through that country? *Answer.* It is about two feet. It varies a little either side of that. And the road-bed conforms, in a general way, to the topography of the country. *Q.* You say you have had some experience in railroad building? *A.* Yes, sir; I have had a little experience in that kind of work. Part of that was in this country. I located a little line here. *Q.* Is this railroad constructed in the usual and customary manner of constructing railroads in open prairie countries? *A.* Yes, sir. *Q.* Properly constructed, is it not? *A.* It is not constructed exactly as I would construct a railroad if I was going to do it, but it is constructed as is generally done in the country. The road-bed is the same as railroad beds are generally made,—by excavating at the side of the track to get earth enough to make the road-bed. *Q.* Is not that the best method of doing? *A.* That is the only method of doing that I know of, in regard to getting an embankment. *Q.* And these culverts are such culverts as are usually and customarily put into railroads? *A.* Yes, sir. *Q.* To allow an escape of water? *A.* Well, I think it is generally not to look for so great an amount of water,—just to provide communication between different ditches, if there is a drainage level between one side and the other, and let all the water go in that direction. The culverts are the ordinary culverts that are put into all the railroads. They are properly constructed. *Q.* And there is the usual number of culverts in this distance that there would ordinarily be in a low, flat country, are there not? *A.* Yes, sir; there are as many as are customary. *Q.* And they are made to conform to the topography of the country, are they not? They are put in where the natural flow of water would be to the lowest points? *A.* They are; yes, sir; in regard to these ditches.

Q. Well, these ditches, as you say,—you do not call them ditches; they are excavations? A. They are excavations. Q. And it is usual and customary to excavate, and not to ditch? A. Yes, sir. * * * Q. These culverts are how far apart, Mr. White? A. I think about three-quarters of a mile; am not certain. Q. You say they are put along here in that stretch of road as frequently as it is customary to put in culverts over flat country? A. Yes, sir; they are three-quarters of a mile on an average. Q. Of course, if there was any embankment there at all, the tendency would be to obstruct the natural flow of water, would it not? A. If there is a flow in that direction. Q. Well, is it not customary, across a country like that, to construct a road upon piling, or all culverts, in order to prevent diverting the natural flow of the water? A. No, sir; not in that kind of a country at all. Q. We have put in here the ordinary and usual number of culverts for the conveyance of water, in the construction of railroads, have we not? A. There are as many culverts, I should say, as there are ever put into railroads in that distance. There is a question of drainage in regard to the location of culverts."

And the testimony of the other witnesses and experts called by the plaintiffs and defendant were substantially to the same effect. The evidence also unmistakably shows that the excavations at the sides of the railroad, and upon the defendant's right of way, were not ditches constructed to carry off the surface water, but were only the usual and ordinary cuts and excavations made to obtain the earth of which the embankments were constructed, and that they were, as is usually the case, deeper at or near the depressions of the surface, and of less depth at or near the elevations. And the contention at the argument in this court was not, as alleged in the complaint, that the defendant had constructed a ditch along its right of way, but that it should have done so, and thereby have carried off the surplus water to a distant coulee, instead of collecting it in reservoirs, and discharging it by culverts upon the plaintiffs' land.

At the close of the testimony the defendant asked the court

to instruct the jury that, "if the water which accumulated on the west side of the embankment was mere surface water, the defendant has a right to get rid of it; and if it built the culvert, into which it was discharged, in a proper manner, and in a proper place, the defendant cannot be made liable for any damage, if any, caused by such overflow on the plaintiffs' land." And also that "the plaintiffs, having acquiesced in the building of the railroad across the land in question, after the building of the embankment, and knowing that such embankment would be maintained by the defendant, cannot recover for the ordinary damage, if any, arising from a proper construction of such embankment." The court declined to give the instructions asked, but instructed the jury as follows: "The plaintiffs having acquiesced in the building of the railroad across the land in question, after the building of the embankment, and knowing that such embankment would be maintained by the defendant, cannot recover for the ordinary damage, if any, arising from a proper construction of such embankment; *but the damage caused to the plaintiffs' land, if any, by the discharge of large and unusual quantities of water from other lands, if such discharge occurred, would not be ordinary damage arising from the proper construction of such embankment.*" To which refusals to charge, and to the giving of which instruction as modified, the defendant excepted, and alleges the exceptions as error here.

The theory upon which the case was tried and submitted to the jury, and upon which it is sought to sustain the judgment here, is, as already suggested, that although the road-bed was constructed in the usual and ordinary manner, and although its embankment, ditches, and culverts complained of were constructed with the care and skill usual and customary in the construction of other roads, yet because the surface water naturally flowing upon plaintiff's land was interrupted and disturbed thereby, and they suffered injury therefrom, the defendant is liable in an action of tort for damages; that although defendant had a right to do what it did, and although the act complained of was done in the usual and ordinary manner, with the usual

and ordinary care and skill, yet it is liable as a trespasser for the injury which is caused by its lawful acts so done in a lawful manner.

It is not necessary to follow counsel into the learning of the books, or the niceties of discussion found in the decisions of the courts, to determine whether the doctrine of the civil or common law is most adapted to our western habits, character, and civilization. If the plaintiffs can recover at all upon the case made, and upon the theory contended for, they can recover irrespective of the doctrine of the common or civil law. The defendant could not, by the rule of either the civil or common law, collect large bodies of surface water upon its own premises by artificial means, and eject the same by unnatural streams, and in unusual quantities, upon the land of another, without a license or authority so to do. And this brings us to the nub of this case, the pivotal point upon which the plaintiffs' argument rests, if they may be permitted to maintain this action upon the theory now advanced, and under the pleadings as they yet stand.

Conceding the road, with its embankments, ditches, and culverts, to have been constructed with the ordinary skill and care generally bestowed upon such work in the construction of other roads, and that it was authorized to build and construct its road across plaintiffs' premises by their express grant, can they maintain this action for damages for one of the injuries sustained by reason of such construction? It will be conceded that the company obtained, under their deed from plaintiffs, all the rights which it would have obtained by condemnation under the statute. This has been uniformly held by the courts, and the doctrine is announced by the text-writers upon this subject as follows: "The same effect is given to a deed, made to the company by a land-owner, of so much land as the company would otherwise be entitled to condemn for the erection of its works. The consideration of the deed is deemed to stand in place of the damages which would have been assessed by commissioners acting under the statute." 1 Thomp. Neg. 570. And the question now occurs, what rights did the defendant

company, by virtue of its charter, obtain under the deed, or what rights would it have obtained by condemnation proceedings under the statute? The right of way is generally understood to embrace a right to do all and everything within its limits necessary for the proper construction and maintenance of its road, within the powers conferred by its charter. And the compensation made is understood to cover all the damages naturally arising, and reasonably expected to flow, from the proper construction and maintenance of such a road. Thompson says: "It is understood to embrace compensation for all damages reasonably expected to flow from the construction and maintenance of the work if done in a proper manner, and without negligence." 1 Thomp. Neg. 570.

What would be a *proper* construction of a railroad, and what would be a *proper* construction of its embankment, ditches, and culverts? Would it not be a fair standard for commissioners and jurors, in estimating the damages likely to accrue to adjacent land-owners from the construction of the railroad across their lands, to bring to their aid their knowledge and experience as to how other roads of a similar character were usually constructed, and what would be the damages which would ordinarily and naturally occur from such construction? And, in absence of any special profile of the road submitted for their consideration, would they not act properly in presuming that the road would be constructed in the usual and ordinary manner, and that the ordinary and usual damages would result? And if the road were constructed in the usual and ordinary manner contemplated by the parties to the contract for the right of way, or by the commissioners in the proceedings for condemnation, would it not be constructed in a proper manner? Can a party be said to be negligent in doing a lawful act in a proper manner? These questions contain their own answers, and do not admit of argument. If, as plaintiffs admit, "it is not claimed that the railroad company did not construct a proper embankment, ditches, and culverts for railroad purposes," then the defendant was not negligent in their construction, and the

embankment, ditches, and culvert were proper ones, for the defendant was constructing such works for *railroad purposes* only. The company was not building embankments, digging ditches, and erecting culverts for the benefit of plaintiffs or any adjacent land-owners especially. It is true that railroad companies are to a certain extent public corporations, and are presumed to act for the public benefit, and upon that theory the corporation is given rights of eminent domain, and other public rights; but it is not presumed to be running its lines of road across plaintiffs' farm, and the farms of others, for their benefit; on the contrary, the law presumes the company does so to their injury, and requires it, as a condition precedent, to make payment of all damages arising from such burdens imposed and injuries sustained. The company condemns or purchases its right of way for *railroad purposes*. It builds its road, with its embankments, ditches, and culverts, for *railroad purposes*, and it is only required to construct its road in a manner suitable and proper for *railroad purposes*. And in payment for its right of way it is required to make compensation for the injuries sustained by the adjacent land-owners by the use of such right of way granted or condemned for *railroad purposes*. And as the company is required to pay such damages as may reasonably and naturally follow from the occupation of its right of way for *railroad purposes* only, it can use such right of way for no *other purpose*, and a failure to make use of such right of way for such purpose, and its use for another and foreign purpose, forfeits its rights and determines the use, and it reverts to the original owner, under the statutes of many of the states; and in all the use of the right of way for other than *railroad purposes* may be restrained by the owner of the fee. It follows, as a necessary corollary, that, if the injury complained of was a natural and probable result of the construction of the railroad along the right of way granted by plaintiffs, it was compensated for in the consideration of the grant, and an action cannot be maintained therefor. It may be safely assumed that the grantors, in making their grant of the right of way, were familiar with the character of

the land over which the road was to pass; that they knew of the elevations and depressions in the surface of the soil; that they were familiar with the surrounding country, and knew the general direction of its drainage, and the consequent interruption of its surface flow by the construction of embankments, digging of ditches, and the erection of culverts, such as are generally used in the building of railroads upon level prairies; that they must have known that in the depressions the excavations at the sides were liable to be of considerable depth, and that, in case of high water or general overflow, were liable to be filled with surface water, and to be discharged through the usual culverts upon adjoining lands; that they were familiar with the usual and ordinary methods of constructing railroads; that the earth for the construction of the necessary embankments must be obtained from the right of way, and that these excavations would be of greater or lesser depth according to the elevation or depression of the soil crossed by such road; and that the culverts for the protection of the road-bed, and to prevent accumulation of surface water along the line, would be constructed of the size, and with the frequency, usual and ordinary in such cases, consistent with careful and skillful engineering in the construction of such roadways. And if the company defendant did no more than might have reasonably been expected it would do, and if it did the work in the manner it might reasonably be expected it would be done, how can it be said that the work was negligently done, or that the defendant had committed a wrongful act, subjecting it to an action for damages thereby sustained? And how can it be urged that the plaintiff can have and maintain an action for injuries contemplated in, and naturally presumed to flow from, the acts licensed to be done, and for which compensation for consequent damages had been agreed upon and paid?

It has now become the settled law of this country and England that the right of way obtained under their charter permits railroads to use steam-engines in propelling their trains; and that if, in the necessary use of fire for the production of steam

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for such purpose by the usual and best approved appliances, without negligence, sparks escape, and set on fire the premises of adjacent owners of property, such loss must be borne by the owner as one of the incidents of the operation of railroads; that the license to operate the road carries with it the right to use the dangerous elements necessary to its operations, when used in the ordinary manner, and by the means and appliances generally adopted and approved by other roads in the locality. *Vaughan v. Railway Co.*, 5 Hurl. & N. 678; 1 Thomp. Neg. 152, American authorities cited.

It is true that the legislature in granting the right to construct these great highways and arteries of commerce, and to maintain and operate the same by dangerous agencies, imposes upon the corporations a degree of skill and care in their construction and operation commensurate with the nature of the work and the agencies employed; but, when a compensation is awarded for consequent damages, the presumption is that it is in payment of the proximate injury contemplated and reasonably expected to result therefrom, and the degree of care and skill required of the company and its agents will be graduated by the character of the work and the agent employed. If the agent employed is fire, the highest degree of skill and care in its management and control is expected and demanded to protect the property adjacent from injury or destruction. Yet, as we have seen in such cases, no greater or higher degree of care or skill is demanded than that ordinarily used and employed by other roads of like character and construction; and that to require more would be to exact of the particular company extraordinary skill and care. Would it be contended that if defendant had, in constructing its road, cut down and removed from its right of way large and overhanging trees, whereby the plaintiffs became injuriously affected by sunlight and winds, that the company would be subject to this action for damages? Would it be contended, if the defendant, in the construction of its road in the usual manner, constructed across some ravine so high an embankment that thereby great quantities of snow were blown by the wind,

and lodged upon the plaintiff's land, by which they sustained injury, that this case could be maintained? Would it be contended that if, in the ordinary construction of its road, the necessary erection of covered bridges or higher embankments interfered with the comforts or convenience of the plaintiffs by intercepting or diverting their rays of light or heat, or by the destruction of their grounds in digging down its hills or filling up its lakes,—would it be contended that, in any of these cases in which the right of the plaintiffs to the free and unrestricted enjoyment of one or all the elements had been cut off or intercepted by the construction of defendant's road in the ordinary use of its chartered powers, they were not compensated in the purchase of the right of way?

But it is contended that compensation for the right of way included only the ordinary damages that would arise from the construction of the road across the premises granted or condemned; that it does not, and is not intended to, include damages extraordinary; or, as the books say, it includes only "damages reasonably expected to flow from the construction and maintenance of the work;" and therefore that the action for extraordinary damages will lie against the owner of the right of way, notwithstanding the grant or award of condemnation. And the charge of the court seems to have proceeded upon this theory. The jury were instructed that, in case of acquiescence, etc., by plaintiffs, "they could not recover for the ordinary damage arising therefrom." The learned judge, however, proceeds to say: "But the damage caused to the plaintiffs' land, if any, by the discharge of large and unusual quantities of water from other lands, if such discharge occurred, would not be *ordinary damage* arising from the proper construction of such embankment." This instruction is not only open to the objection that it trenches upon the province of the jury in determining by the court what it is their duty to determine, to-wit, what was not ordinary damage, but it gave the jury to infer that, while the defendant might not be liable for *ordinary*, it would be liable for *extraordinary* damage, caused by the construction of its road and embankments

across plaintiffs' land. It does not follow that, because a railroad company is not required to make compensation in advance for extraordinary damages that may result from the construction of its road, that it will be liable in a subsequent action for such damages as were not in fact contemplated or considered in determining the amount of such consideration or award. The commissioners or jury who are required to determine the amount of damages likely to result from the probable acts of a railroad company in constructing its road along a given right of way act as a judicial tribunal determining cases of damages or injury to real property in advance of the act committed, and, while they may not be so exact in arriving at the real injury or damage suffered as they might be if the acts had been already done, and the results were visible, yet they are in each case governed by certain fixed rules of evidence, and the result of their deliberation is a judicial determination, and includes in it all the damage to which the party is entitled as compensation for the commission of an otherwise wrongful act. And as it would hardly be contended that, after a party had recovered in a civil action for the ordinary damages resulting from a wrongful act, that he could be permitted subsequently to sue and recover for the extraordinary damages resulting from the same injury, no more can it be permitted to the party injured, who has received compensation for the ordinary injury, to bring a subsequent action for the extraordinary damage resulting from the same act. Not only would such a proceeding, if permitted, require the courts to distinguish, and the jury to find, what portion of the damage was the result of ordinary, and what portion of extraordinary, injury, but it would break down the long and well-established principles upon which awards and judgments of courts are founded, to-wit, that they are presumed to cover not only what was, but what might have been, determined by them; and the grant, as we have seen, is open to the same reasoning as the award of commissioners. It is true that, in cases of right of way, the commissioners are not presumed to take into consideration damages extraordinary; but that is a mere rule of evidence, and does not affect the

presumption arising from the rendition of the award, or from the payment of the consideration of the deed. The legislature has the power to make the award as limited or comprehensive as it may choose. Our legislature has made provision for not only the most extended inquiry by the commissioners, but it has given them the broadest latitude in matters of damage or compensation. Section 452, Civil Code, provides that "the commissioners shall inspect said real property, and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which such owner will sustain by such appropriation of his land." It is true that, under the broad provisions of our statute, the commissioners are not, in terms, confined to ordinary damages; but the law presumes that only the usual and ordinary damages are taken into consideration in determining such injury, because it is only against such injury as is caused by its negligence that the company is bound to provide in the construction of its works, under the American and modified English doctrine. The doctrine of the English exchequer, announced in *Fletcher v. Rylands*, 3 Hurl. & C. 774, that "one who brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous, if not kept under proper control, though in so doing he may act without personal willfulness or negligence, will be liable in damages for any mischief thereby occasioned," has been much modified by the English courts, and has never been received with approval by our courts. And it may be said with safety that the generally approved American doctrine is that negligence is the proper basis of recovery in such actions. Any other rule in our country would strike a blow at all great works of improvement, and become disastrous in its results. The rule has also in England had placed upon it many restrictions, and has received material modifications. In *Nichols v. Marsland*, L. R. 10 Exch. 255, (affirmed on appeal,) it appeared that the defendant was the owner of a series of artificial ornamental lakes, which had existed for a great number of years, and had never, previous to the 18th day of June, 1872, caused

any damage. On that day, however, after a most unusual fall of rain, the lakes overflowed, the dams at their lower ends gave way, and the water out of the lakes carried away the county bridges lower down the stream. The jury found that there was no negligence either in the construction or the maintenance of the reservoirs, but that, if the flood could have been anticipated, the effect might have been prevented. Upon these facts, BRAMWELL, B., delivering the judgment of the court of exchequer, says: "In this case I understand the jury to have found that all reasonable care had been taken by the defendant; that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or *vis major*. No doubt, as was said by the counsel for the plaintiff, a shower is the act of God as much as a storm. So is an earthquake in this country. Yet every one understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called the act of God, or *vis major*; no doubt, not the act of God, or *vis major*, in the sense that it was physically impossible to resist, but in the same sense that it was practically impossible to do so. Had the banks been twice as strong, or, if that would not do, 10 times as strong, and 10 times as high, and the weirs 10 times as wide, the mischief might not have happened. But these are not practical conditions. They are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community. So understanding the finding of the jury, I am of the opinion the defendant is not liable."

And this is in accordance with the American doctrine as announced by the supreme courts of the various states. The American cases lay down the doctrine that, for damages accruing from extraordinary floods, or other causes that may be attributed to the act of God, or which cannot ordinarily be foreseen or prevented, there can be no liability. See *China v. Southwick*, 12 Me. 238; *Bell v. McClintock*, 9 Watts, 119; *Bridge Co. v. Navigation Co.*, 4 Rawle, 9; *Everett v. Tunnel Co.*, 23 Cal. 225; *Hoffman v. Water Co.*, 10 Cal. 413; *Wolf v. Water Co.*, Id.

541; *Lapham v. Curtis*, 5 Vt. 371; *Higgins v. Canal Co.*, 3 Har. (Del.) 411; *Canal Co. v. Ryerson*, 27 N. J. Law, 457; *Tenney v. Ditch Co.*, 7 Cal. 335; *Richardson v. Kier*, 34 Cal. 63; *Shrewsbury v. Smith*, 12 Cush. 177, etc.

And the American doctrine is very well illustrated in *China v. Southwick*, cited *supra*, where A. erected a dam at the outlet of a pond, and thereby raised a head of water, but not so high as to overflow or injure a bridge at the head of the pond, belonging to B. A number of years afterwards, in consequence of great rains and a violent wind, the waters were thrown upon the bridge, and it was destroyed. It was held that A. was not liable to pay damages to B., for, "if there had been no dam, the injury might not have happened; but the defendant had a right to erect it, and that without being responsible for remote and unforeseen consequences." And the doctrine announced applies with still greater force to the facts of this case, in which it appears that the obnoxious ditches were not constructed for holding or conveying water, but were the natural and necessary excavations caused by the erection of the embankments required in the construction of defendant's road-bed.

It is in evidence by plaintiffs' own engineers that they knew of no other way of constructing railroads; that a trestle-work would be impracticable; and that these excavations were the usual and necessary ones caused in the erection of the embankment in question. But, suppose they had been constructed as water ditches for the carrying off the surplus water necessary for the protection of defendant's road-bed, would defendant have been required to have guarded against more than ordinary and usual surface flow? Would not a flood of the dimension and character proved in the case at bar have been *vis major*, or such unforeseen consequence as to avoid liability?

But we are not obliged to travel beyond the facts of the present case to speculate upon the rules of law governing the construction of ditches and reservoirs constructed upon the right of way for the convenience of the company or the protection of the road. The case at bar shows that the road-bed was constructed

in the usual and ordinary manner, with the usual and ordinary skill and precaution, and the defendant company was not required to use extraordinary skill or care in the construction of its embankments or culverts. It was not required to anticipate extraordinary floods or superhuman agencies. It had the right to dig up its right of way in the ordinary and usual manner, and to construct its culverts of the usual and ordinary size, with the usual frequency, to equalize the flow of the surface water. And if, by such usual and ordinary construction of its road, the surface of the earth was necessarily changed, and the currents of the surface water were interrupted and diverted, it was one of those ordinary incidents of railroad construction which might have been reasonably expected to have resulted from such work, and one that plaintiffs themselves were bound to have guarded against, and to have used such precautions as were in their power to remedy. Any other rule would require railroad companies in level countries to build their roads upon elevated trestle, or encounter the hazard of some disturbance of surface elements.

It may not be uninteresting, in this discussion, to glance at the authorities upon the question of what damages are included in the award of commissioners arising from the appropriation of the right of way by railroad companies. The case of *Walker v. Railroad Co.*, 108 Mass. 10, is a leading case. The jury appointed upon petition to the county commissioners, under the Massachusetts statute, had allowed for damages caused by defendant's obstructing the surface water by means of its embankments, and thereby turning it upon plaintiff's land. The defendant company claimed this was not a proper element of damages for the consideration of the jury, but the supreme court on appeal, holding it a proper matter for their consideration, says: "The injury from surface water turned back by the embankment of the railroad, and made to flow upon the petitioner's land, or prevented from escaping therefrom in the usual mode, was proper for the consideration of the jury in estimating his damages. Where there is a public, or even, as it would seem, a private, right or easement of drainage, it is the duty of the railroad cor-

poration to make suitable provision for it; and their failure to do so subjects them to an action of tort, but not to damages upon complaint. *Proprietors v. Railway Corp.*, 10 Cush. 385, etc. But no such duty exists in regard to surface water. The cuts and embankments and necessary gutters of the railroad track will unavoidably modify the flow of surface water, and sometimes cause damage by keeping it back, or projecting it in large quantities upon lands adjoining the road. Injuries to lands from such causes would seem clearly to fall within the class of effects which have been held to afford ground for the assessment of damages under the statute. *Dodge v. County Com'rs*, 3 Metc. 380," etc. In *Munkres v. Railroad Co.*, 72 Mo. 514, the following instruction given by the court below to the jury was held to be good law by the supreme court on appeal: "The relinquishment of the right of way read in evidence authorized the railroad company to enter upon the plaintiff's lands, and construct its road, in the usual manner of building roads, by throwing up and raising the ground for the road-bed, and by cutting ditches along the sides of the road to keep the water off the track. If, therefore, you find, from the evidence, that the road-bed and bridges were constructed with reasonable care and skill with reference to the use of the same for railroad purposes, and the plaintiff has been incidentally injured by the collection and flow of surface water upon his lands caused by the construction of the road, he is without remedy for such injury. The railroad company was not bound to make ditches larger or longer than was necessary to secure its road-bed. It was not bound to make ditches to protect the plaintiff's land from injury from surface water which might collect along the road." And, for a full and complete citation and collection of the authorities on this subject, see 1 Thomp. Neg. 568n.

But it is contended that, although the injury was one that may have been reasonably contemplated by the parties in the purchase of the right of way, that it did not come within such grant, and was not compensated for by the consideration of the grant, because it was the duty of the defendant to have guarded

against such surface water, and to have provided means for its removal. And in support of this theory there was evidence tending to prove that several miles distant from the plaintiffs' land was a coulee somewhat larger than the others, and there was some evidence tending to show that a ditch might have been dug of sufficient depth to have carried the surface water to, and to have discharged it into, this coulee; but this theory was strenuously combated by the engineers of the defendant, and it satisfactorily appears, from all the evidence, that the conduction of the stream of water along the side of the defendant's right of way, if practicable, would have had a tendency to have seriously impaired the strength and solidity of the road-bed, and the safety of the public, in the operation of the road itself. This theory of plaintiffs' the learned judge who tried the case seems to have had in mind, and to have approvingly submitted to the jury in the following words: "In the construction of its railroad it was the duty of the defendant to take into consideration the surface and nature of the country through which it was constructed, and, in the construction of its road-bed, culverts, and ditches, to use ordinary and reasonable care to prevent injury to plaintiffs' property. And if you find that, by the construction of such railroad, ditches, and culverts in the manner in which they were constructed, surface water which would not otherwise have flowed onto plaintiffs' land was collected, conveyed to, and discharged upon plaintiffs' land in large and unusual quantities, and that, by the use of reasonable skill and care, defendant's road-bed, culverts, and ditches might have been so constructed as to permit such surface water to diffuse itself in its natural course over the surface of the country, or to *conduct and discharge into natural channels*, then the plaintiffs are entitled to recover, should you find that they suffered damages by such discharge of such surface water upon their land." The court uses the words "natural channels," without distinguishing surface-water channels from natural water-courses. It does not appear that this coulee was a natural water-course,—that it had any defined channel with bed, banks, or any of the *indicia* of the *water-course* at com-

mon law. And it appears to have differed from the other depressions or coulees only in its size; and the defendant would clearly have been a trespasser in conducting the surface water in question by an artificial channel along its right of way, contrary to the ordinary usage and experience in railroad building, and in discharging the accumulated amount into the coulee described. The defendant would only have succeeded in shifting the burden of the accumulated surface water from the plaintiffs' to another's land, and to have given to that other an undoubted right of recovery in place of the doubtful right claimed by the plaintiffs here. In a recent case in Minnesota,—*Hoganson v. Railway Co.*, 17 N. W. Rep. 374,—the defendant sought to do what the plaintiffs claim it should have done here. The railway company being burdened with accumulated surface water, it sought by the construction of a ditch along and off its right of way to relieve itself of such accumulations, but a land-owner several miles from the mouth of the ditch so constructed, being injuriously affected by the water therefrom, brought his action, and recovered of the company, for turning its surface water, by means of artificial channels, upon his land where there was no natural water-course. The defendant in that action was defendant in this, and, profiting by its experience in that state, it has here sought to avoid constructing channels to conduct off its surface water, and has contented itself with constructing culverts at the various depressions of the surface along its right of way, for the purpose of equalizing its flow, and not for the purpose of conducting it to or from plaintiffs' land. This it clearly had a right to do. Beyond that it would have gone at its peril.

Upon the case as made the plaintiffs had no cause of action, and the defendant's request to direct the verdict should have been granted. The judgment is reversed, and a new trial ordered.

All the justices concur.

NICHOLS, Respondent, v. BRUNS *et al.*, Appellants.

Principal and Agent—Ratification of Tort—Knowledge Requisite.

One cannot be held liable for the fraudulent representations of an unauthorized agent by accepting the benefits without knowledge of the representations. In such case, where the court charged the jury, if the principal accepted the benefits he was liable for the representations, *held error*.

(Argued May 10, 1887; reversed May 26; opinion filed February 8, 1888.)

Appeal from the district court of Cass county; Hon. S. A. HUDSON, Judge.

R. R. Briggs, for appellants.

The plaintiff urges that appellants ratified the agency of Howard by permitting the conveyance of these lots to stand. They certainly did not ratify any fraud on the part of Howard, unless they knew of it. They ratified simply the giving of the price of the lots, and that the conveyance might stand in their three names as tenants in common. In so far as Bruns was concerned, Howard never had authority to make any bargains respecting these lots. *Cooley*, Torts, 128; *Adams v. Freeman*, 9 Johns. 118; 1 *Sutherland*, Damages, 212; *Page v. Parker*, 40 N. H. 47.

Howard never had any appointment as agent of the defendant Bruns. Whatever representations were made by Howard were made on his own behalf, and not in any way representing either of the appellants. Therefore there were no misrepresentations made to the plaintiff on behalf or in the name of either of the appellants; and the fact is that defendant Howard was clothed with no authority whatever to bind defendant Bruns, and the acts and representations of Howard, in so far as Bruns was concerned, were the acts and representations of a stranger. Consequently Bruns did in no way speak or act through the agency of Howard, and we think from the authorities this general proposition is deducible:

That where a stranger falsely assumes to be the agent of a third party, and by deceit purchases a tract of land at its full value of its owner, and in the deed names a fourth party (whose agent he was not) as grantee, (without the knowledge of the grantor,) whose money he has without authority used to effect such a purchase, the grantee in said deed, in finally allowing said deed to stand, does not ratify any fraudulent representations made by said stranger, unless at the time of such alleged ratification he has knowledge of the deceit. C. C. § 1375; C. C. Cal. § 2339; C. C. § 1374; Story, Agency, (9th Ed.) 239; Wharton, Agency, 65, 68; *Lee v. West*, 47 Ga. 311; C. C. § 1349; C. C. Cal. § 2310; C. C. § 1370.

Horace Austin and Wilson, Ball & Wallin, for respondents.

To maintain the verdict in this case, it is not essential to establish the fact that Bruns and Moore, or either of them, actually participated in the unlawful means used by Howard to obtain the conveyance. It is sufficient that the purchase was a partnership undertaking, a joint adventure; that Howard was the agent of Bruns and Moore in obtaining the title from the plaintiff. That one partner should be held responsible civilly for the fraudulent acts of his copartner, or a principal for such acts of his agent, it is not essential that such partner or principal should have had any criminal or guilty participation in, or knowledge of, the fraudulent means taken to accomplish the object. Civil Code, §§ 1366, 1374; Story, Partnership, § 108; Collyer, Partnership, § 445; Dunlap's Paley's Agency, pp. 301, 302, 324, 325; Chitty, Contracts, 198, 199, notes *l* and 4; 3 Chitty, Com. Law, 209; *Hern v. Nichols*, 1 Salk. 289; *Griswold v. Haven*, 25 N. Y. 595, 600; 31 N. Y. 529; 39 N. Y. 287; 47 N. Y. 27; *Locke v. Sterns*, 1 Met. 562, 563; 1 Addison, Contracts, § 61.

TRIPP, C. J. This is an appeal from Cass county. The action is one of tort in the nature of deceit. The complaint charges a conspiracy on the part of the defendants. Bruns, Moore, and

Howard, carried into effect through the agency of defendant Howard, acting for and on behalf of all the defendants, whereby the plaintiff was induced, through the fraudulent representations of said Howard, made with the knowledge of the other defendants, to convey to them certain lots in the town of Moorhead for a sum much less than the real value, and by reason thereof he suffered damages, etc.

The defendant Howard answers separately, and the defendants Moore and Bruns jointly. The answers of all the defendants, in effect, deny generally the allegations of the complaint, and specifically the allegations of conspiracy, fraud, and deceit. The answer of Moore and Bruns specifically pleads ignorance of the fraudulent representations alleged in the complaint, and the defendant Bruns specifically pleads a want of authority on the part of defendant Howard to make the purchase for him or on his behalf.

No objection is raised by either party to the form or sufficiency of the pleadings, and the case seems to have been tried upon the theory that they were sufficiently expansive to cover any case made by the evidence. The entire evidence and the charge of the court is set out at length in the record, and the exceptions taken are numerous; the assignment of errors alone covering fourteen printed pages.

A motion for a new trial was made and filed more than one year after the verdict was rendered; but, as the order denying it does not state the grounds upon which it was denied, it must be presumed to have been upon the ground that the motion was not made within the time nor in the manner prescribed by statute. It cannot, therefore, be considered, and the court will be confined to errors contained in the bill of exceptions and apparent of record.

At the close of the evidence the plaintiff seems to have practically abandoned the theory of active conspiracy, and to have based his right of recovery against the defendant Moore upon the theory that he, having authorized the purchase, was bound by the fraudulent representations of Howard made in his (Moore's)

interest, though made without his knowledge or consent; and that, as to defendant Bruns, he, having accepted the deed, and paid therefor, thereby made Howard his agent, and ratified his acts, including all fraudulent representations made to the plaintiff; and plaintiff accordingly asked and obtained from the court the following instructions, among others, to the jury:

"That it appears from the evidence, and is not controverted by either party, that the defendant Howard acted, in making the purchase, not only for himself, but for the defendant Moore, and had express authority from said Moore to insert his name in the deed as one of the purchasers.

"That when defendant Bruns adopted the purchase, and consented that the same should stand in his name as one of the grantees in the deed of conveyance, he confirmed Howard's agency in acting for him (Bruns) in making the purchase, even though Howard's action in Bruns' behalf had before this been entirely voluntary on his part, and unauthorized by others.

"That if the jury find from the evidence that the defendant Howard acted, in making the purchase, as the agent of the other two defendants by their authority, or that they thereafter adopted the purchase made by Howard, and have adopted the fruits and profits of and arising from the conveyance, then they are, and each of them is, responsible for all the means employed by their said agent to effect the sale, and damage to be ascertained and computed as above directed."

This instruction was duly excepted to, and assigned as error. In giving this instruction, in our judgment, the court erred. It is safe to say it has never been sought before to extend the liability of the principal for the torts of his agent to this extent. It is a much-mooted question whether the principal is ever liable, in an action of tort, for the fraudulent misrepresentations of his agent, made without the knowledge or authority of the principal. In England, in 1867, within two days of each other, two decisions of appellate courts were handed down, in which those learned courts came to exactly opposite conclusions; the one, *Barwick v. Bank*, L. R. 2 Exch. 259, holding that the prin-

principal is liable in tort for the fraud of his agent committed in the course of his business, though without the knowledge of the principal; and the other, *Bank v. Addie*, L. R. 1 H. L. Sc. 146, holding that such an action cannot be maintained, that fraud is in its nature willful, and that the principal or master is not, as a rule, liable for the willful wrongs of the agent or servant. The doctrine of *Bank v. Addie*, *supra*, has been adopted in America by the New Jersey court, in *Kennedy v. McKay*, 43 N. J. Law, 288; and the doctrine of that case seems to have been adopted in *Page v. Parker*, 40 N. H. 47, which is cited in 1 Suth. Dam. 212, as holding that "an action for deceit, in the nature of a conspiracy, cannot be sustained against a principal for the unauthorized fraudulent acts and representations of the agent alone."

The doctrine of *Bank v. Addie*, *supra*, has, however, been somewhat modified in England by later decisions, (*Swift v. Wintherbotham*, L. R. 8 Q. B. 244; *Mackay v. Bank*, L. R. 5 P. C. 394; *Houldsworth v. Bank*, 5 App. Cas. 317;) but it may be safely stated that the rule has never been extended further than to hold the principal liable in tort for the fraud of his agent committed within the scope of his authority.

This instruction goes to the full extent of telling the jury that, if the defendant Bruns accepted the deed, he thereby ratified the fraudulent representations of Howard, *though ignorant that any such representations were ever made*; for the instruction is that, "if he adopted the purchase made by Howard," then he "is responsible for all the means employed by the agent to effect the sale." There can be no other meaning, and the jury could have understood the instruction in no other way than that, if he accepted the deed, he was equally liable with Howard for the false representations. There was little left for the jury on this branch of the case. The accepting the deed was admitted, and the defendants Bruns and Moore stood before the jury in the same shoes with Howard. There is no modification of this instruction in the general charge of the court or elsewhere. The court nowhere tells the jury that knowledge of the material

facts is an essential ingredient of ratification. It is elementary that ratification is based upon knowledge of the acts adopted or ratified. Says Judge STORY, in the case of *Owings v. Hull*, 9 Pet. 629: "No doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously authorized, must, in order to bind the principal, be with a full knowledge of all the material facts."

The court and counsel in this case, no doubt, had in mind the class of cases which hold that, where an authorized agent, acting within the scope of his authority, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he is liable as for his own wrong, (*Bennett v. Jodson*, 21 N. Y. 238; *Elwell v. Chamberlin*, 31 N. Y. 611, etc.;) and failed to discriminate between the defense of defendants Moore and Bruns. Howard was not acting within the scope of his authority as to defendant Bruns when he obtained this conveyance and made these representations, if the jury should believe the testimony of Bruns himself, but he was acting outside of and beyond the scope of his authority; and the agency itself of Howard to make the purchase would have to be established by ratification. In such case it is safe to say no court has ever held that the receipt of "the fruits and profits" of a transaction, without knowledge, has ever been held a ratification of the agent's fraud. In *Smith v. Tracy*, 36 N. Y. 79, where the agent had gone outside of his authority, and warranted the sale of bank-stock, when no authority to warrant was implied, and it was claimed that the receipt of the proceeds of the sale ratified the unauthorized acts of the agent, the court, denying this doctrine, says: "In the case before us, it is claimed that the receipt by the testator of the proceeds of the authorized sale is to be deemed an adoption of the contract, made without his authority, and to which he never knowingly assented. Such a ruling would be subversive of well-settled principles, and would open the door to illimitable frauds by brokers, factors, attorneys, and others, clothed with limited powers, and occupying strictly fiduciary relations." See, also, *Bohart v. Oberne*, 13 Pac. Rep. 388; *Baldwin v. Burrows*, v.5DAK.—3

47 N. Y. 199; *Navigation Co. v. Dandridge*, 8 Gill & J. 323; *Roberts v. Rumley*, 58 Iowa, 301, 12 N. W. Rep. 323; *Reynolds v. Ferree*, 86 Ill. 576; *Adams v. Freeman*, 9 Johns. 118; *Lewis v. Read*, 13 Mees. & W. 834; *Hyde v. Cooper*, 26 Vt. 552; *Bell v. Cunningham*, 3 Pet. 69; *Brady v. Todd*, 99 E. C. L. 591; *Seymour v. Wyckoff*, 10 N. Y. 213. Our own statute is an embodiment of the principles of the common law. Civil Code, § 1349. "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or, where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

The cases that hold a principal liable for the torts of the agent committed in the course of his employment do not base the right of recovery upon the ground of ratification, but rather upon the ground of public policy,—that of two innocent parties the one must suffer who has been the indirect cause of the injury by placing the agent in such position as to be the primary cause. Lord Holt, in the early case of *Hern v. Nichols*, 1 Salk. 289, states the reason of the rule thus: "For, seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." Judge Story puts it in this way: "The whole doctrine proceeds upon the intelligible ground that, whenever one of two innocent parties must suffer by the act of a third person, he shall suffer who has been the cause or occasion of the confidence or credit reposed in such third person." Story, Partn. § 108. Chief Justice Shaw says: "The rule [that the principal is liable for the fraud of his agent] proceeds upon the ground that the servant is acting within the scope of his authority, actual or constructive." *Locke v. Stearns*, 1 Mete. 563. It is a species of estoppel upon the principal, whereby he is not permitted to show that the acts were committed without his knowledge or consent. No case bases the right of recovery upon ratification in accepting the fruits of the transaction. The principal would be equally liable for the torts of his agent or servant, committed in the course of his employment, whether he accepted

or rejected the fruits. The law requires him to so far accept the fruits of his servant's misconduct as to be responsible therefor. Our own statute is here an embodiment again of these principles of the common law. Section 1374: "Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal." Section 1375: "A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service." By the last section the principal is never liable for wrongful acts not committed by the agent as a part of the transaction, unless he authorized or has ratified them. If the jury believed Bruns, he never authorized the purchase, and he never ratified it "by accepting the benefit, with the notice thereof." Section 1349, *supra*. And this is the more especially the proper rule in an action of deceit, as applied to the facts of this case, where the defendant Howard was at most a special agent, of whose power and authority the plaintiff was charged with notice. *Nixon v. Palmer*, 8 N. Y. 398; *Beals v. Allen*, 18 Johns. 363.

It was therefore error to give this instruction to the jury without in some manner informing them that such adoption of the purchase must be accompanied with knowledge or notice of the material facts of the transaction; and as the action is joint, and all the defendants have appealed, a new trial must be granted as to all.

The tide seems to have been strongly with the plaintiff in the trial of this case, and the defendants seem to have been surprised at the final turn taken by plaintiff's attorneys in its submission to the jury, and the defense was not fully developed. The case is one bristling with close and difficult questions of law, which we have not seen fit to determine, if proper to do

so in this premature presentation to the court; and, as the case must go back for a new trial, we have thought best to send it down unhampered by "the law of the case," with the remark that all other errors in the case assigned and presented in argument are left open and undetermined, subject to future examination and determination, should the case ever find its way here again. The judgment is reversed, and a new trial ordered.

All the justices concurring.

**FARREN, Respondent, v. COMMISSIONERS OF BUFFALO COUNTY,
Appellants.**

1. Constitutional Law—Legislative Power.

R. St. U. S. § 1860, confers express power upon the legislature of the territory to prescribe the qualifications of voters.

2. Voters—Elections—Counties—Registration—Qualifications of Voters.

Section 47, c. 27, Pol. C., after prescribing certain qualifications, provides that all persons who "shall have complied with the provisions of any law which is now, or may in the future be, in force relating to the registration of voters, shall be entitled to vote." After this there was a law passed with reference to registration, (Laws 1881, c. 122,) whereby, to be entitled to vote, the elector must have been registered, or must qualify, at the time of offering his vote, by furnishing the judges with his affidavit, stating certain facts showing him to be a legal voter, etc. *Held*, that the requirements of the act of 1881 were not mere regulations, but qualifications that the elector must have met before being entitled to vote; and an election to change the county-seat, where there had been no registration, or qualification of voters by affidavit, as required by said act, (on contest for that purpose,) *held*, void.

3. Registration Act 1881, c. 122, § 15 — County Boundaries—Indian Reservation.

The registration act 1881, c. 122, § 15, applies to counties bordering on the Missouri river, etc. The act 1878, c. 16, § 26, bounds Buffalo county by the Missouri river, but that part is an Indian reservation. *Held*, that the act applied to Buffalo county.

(Argued May 21, 1887; affirmed May 26, 1887; opinion filed February 14, 1888.)

Appeal from the district court of Brule county; Hon. BARTLETT TRIPP, Judge.

J. M. Long, for appellant.

The only ground upon which this contest is based is the allegation that there was no meeting of the board of registry prior to said election, and no evidence was furnished by the voters at the time of presenting themselves to the judges of election and voting of their right to vote.

For the purposes of this case, under the registry act, the court held that Buffalo county was one of the counties in which the registry law was in force.

Buffalo county was organized in January, 1885. The registration act went into force in March, 1881, and was to be in force in the counties bordering on the Missouri river. There was no such county as Buffalo, in which this law could be enforced. The law provides that any other county could adopt it if they so desire. There is no claim that Buffalo county ever adopted this act, and, being special legislation, there can be no implication drawn from the law that it was to extend to and be in force in counties "in future," and an outlying district is not a county until it is organized for political purposes. The law does not say, "all counties now or hereafter bordering on the river," but says, "in those counties bordering on the Missouri river." In fact, there is not now, and never has been, any such a county bordering on the Missouri river. A portion of the Sioux Indian reservation lies between the county and the river. Section 1839, U. S. Statute, in creating Dakota, declares that this very district shall be excepted out of the boundaries, and constitute no part of any territory, and that the territory shall not have any jurisdiction over such country, and any act extending lines of a county into the Sioux country was void to that extent. *McCrary, Elections*, §§ 53, 54.

Upon the second ground, that, if chapter 122, Laws of 1881, are in force, we think there is nothing in this case upon which to declare this election void. Section 13 of chapter 27 of the Po-

litical Code says that "all persons voted for by an elector at any general or special election shall be on one ballot." Section 14 of the same chapter declares what the qualifications of an elector shall be. Section 1 of chapter 122, Laws of 1881, says that all persons qualified and entitled to vote at the ensuing election shall be listed, and that in new election precincts they shall make a list from the best means at their command.

There can be but one construction to be placed on these sections as to who are qualified by law to vote at an election. The statute invariably uses the word "elector" when applying the term as to qualifications of a voter; hence an elector is, ecifically, a person legally qualified to vote in any county; and section 1 of the registry act says the list shall be made and contain the names of all persons qualified to vote at the ensuing election. If this be so, then the registry law is not a qualification. The qualifications of voters are explicit, exclusive, and unqualified by any exceptions, provisos, or conditions; and the organic law either directly or by implication confers no authority upon the legislature to change, add to, or abridge them in any respect.

If the persons entitled to vote have the qualifications before the opening of the board of registry, or become qualified after the second meeting of the board, then the registry in no way adds to or abridges the right to vote; and, if this be true, then the registry law at most can only be a regulation.

Section 47, c. 27, Pol. C., says that every male person above the age of 21 years, who is a citizen of the U. S., or has declared his intention to become such, and resided a certain time in the territory and his precinct, and shall have complied with all the provisions of any registry law, shall be entitled to vote, and all such persons shall be eligible to any office in said territory.

Supposing a person is voted for for an office, whose name is not on the register of voters, and who has not furnished an affidavit provided for by section 8 of the registry law; or suppose he comes in the prohibited class in subdivision 4 of section 1860

of the Revised Statutes,—this clearly distinguishes the difference between the law-making qualification of voters and the law regulating manner of holding elections. The registry law is clearly a regulation. The qualifications exist with or without a registry law. Section 8 of the registry law says: "Any person may be challenged, and the same oaths required as now or hereafter may be prescribed by law." What oath? The oath as to qualification of an elector.

Section 13 of chapter 27 of the Political Code says: "All persons voted for by an elector at any general election or special election shall be on one ballot." Section 6 of chapter 21 declares that the qualified voters are empowered to select the place of the county-seat by ballot at the first general election held in the county.

Section 2007 of the U. S. Statutes declares that "acting thereon shall be deemed and held as a performance in law." It is admitted by respondent that these voters were not challenged, nor any objection made to their voting, and the presumption must be that they were legal voters, and so known to the judges of election; and when the several persons offered the votes to the judges, and they were received and deposited in the ballot-box, they acted on that ballot, and it is deemed and held a performance in law. Section 2007, U. S. Statute; *Dule v. Irwin*, 78 Ill. 185.

Section 41 of chapter 27 says that no returns shall be refused by the canvassing board in making the estimate of votes for any informality in holding an election. The most that can be claimed for the registry law is that it is an informality. *Sharon v. Wooldrick*, 18 Minn. 351, (Gil. 325.)

Even should the court set aside the returns, because the judges had acted illegally, the election will stand, and the duty remains to declare what the true state of the vote is. *McCrary, Elections*, § 368; 16 Mich. 328.

There is no claim of fraud; no claim that any one was injured; and it is conceded that Buffalo Center received a majority of all the legal voters' votes in the county. *Dobyns v.*

Wendon, 50 Ind. 298; *Taylor v. Taylor*, 10 Minn. 107, (Gil. 81.)

The rules prescribed for conducting an election are directory merely, not jurisdictional or imperative. *Pratt v. People*, 26 Ill. 72; *Knox Co. v. Davis*, 63 Ill. 405; *Dupage Co. v. Scott*, 65 Ill. 360; *People v. Cook*, 8 N. Y. 67; *Day v. Kent*, 1 Ore. 123; *Taylor v. Taylor*, 10 Minn. 107, (Gil. 81;) *Edson v. Child*, 18 Minn. 351, (Gil. 43;) *McKinny v. O'Conner*, 26 Tex. 5; *Jones v. State*, 1 Kan. 279; *Juker v. Com.*, 20 Pa. St. 493; *Brightly*, El. cc. 448-449-450.

The presumption of the legality in no way depends upon the omission to challenge or object to it, or any presumed knowledge of the judges of the election, but it arises from the fact of the depositing of the ballot in the ballot-box. A vote deposited is presumed to be legal, until there is evidence to the contrary. *Clark v. Robinson*, 88 Ill. 498; *State v. Baker*, 38 Wis. 89; *County v. People*, 65 Ill. 362; *Fry v. Booth*, 19 Ohio St. 25.

And it was so distinctly held, on the contest of an election, that unregistered persons who had voted at the election without having been registered, and without having furnished proof that they were entitled to vote, as required by the registry law, should not be rejected. *Dale v. Irwin*, 78 Ill. 185; *Kuykendale v. Harker*, 89 Ill. 126; *Hodge v. Linn*, 100 Ill. 402; *Clark v. Robinson*, 88 Ill. 504; Rev. St. Ill. 1874, p. 470, § 14; *Webster v. Gilmore*, 91 Ill. 324; *Taylor v. Taylor*, 10 Minn. 107, (Gil. 81;) *Edson v. Child*, 18 Minn. 351, (Gil. 43.)

It is conceded by all courts that time and place are of the essence of every election. Yet no court has held that where place had been disregarded, in the absence of fraud or undue advantage, the election would be void. The provisions as to the manner of holding elections are directory, unless it affirmatively appear that the irregularity is of a character to change the result. *Farrington v. Turner*, 18 N. W. Rep. 544; *Weil v. Calhoun*, 25 Fed. Rep. 871.

There is nothing in this law that requires voters to register in order to be qualified to select the place of choice of county-seat, for in making that choice the people simply give expres-

sion to the public will as to where the business shall be done. *State v. Harvey*, 14 N. W. Rep. 246; *Co. seat Linn Co. Kansas*, 15 Kan. 500; *Osage Co.*, 16 Kan. 296; *Board v. Moor*, 17 Minn. 412, (Gil. 391;) *Beran v. Smith*, 47 Ill. 482; *People v. Ohio Grove*, 51 Ill. 191, 63 Ill. 405; *People v. Turner*, 47 Ill. 246.

The voice of the people is not to be rejected, if they in truth have spoken. *Dishon v. Smith*, 10 Ia. 218; *People v. Hoge*, 55 Cal. 619; *Weil v. Calhoun*, 25 Fed. Rep. 871.

Goodykoontz, Kellum & Porter, for respondent.

Congress gave our territorial government its organic act, its constitution, and in it expressly vested the power to fix the qualifications of voters in the legislative assembly. Sections 1859, 1860, R. St.

In executing this power it has provided that one of such qualifications shall be that the person "shall have complied with the provision of any law which is now, or may in future be, in force relating to the registration of voters." Section 47, c. 27, Pol. C.

Compliance with the registration act is thus made a qualification.

In Wisconsin and Pennsylvania the courts have condemned the particular registration laws, because by them, as they held, the legislature had attempted to add a new and further qualification to the qualifications which the state constitution had enumerated, as all that were requisite to entitle a person to vote. *Dells v. Kennedy*, 6 N. W. Rep. 246, dissenting opinion by TAYLOR, J., 381; *Page v. Allen*, 58 Pa. St. 346. This objection has no application here.

We insist: *First*, the organic law making the qualifications of voters "such as may be prescribed by the legislative assembly;" *second*, the act of the legislative assembly fixing as one of such qualifications compliance with any registry act in force in the territory; *third*, the act of the legislative assembly providing for the registration of voters. Compliance with the registry law,

either by registration or by furnishing to the judges of election, in case of non-registration, other proof of qualifications, is affirmatively made an absolute and indispensable qualification and pre-requisite to the right to vote.

An effort is made to avoid the effect and operation of this registry law, so far as the defendant county of Buffalo is concerned.

Section 15 provides that it shall only extend to and be in force in certain designated counties, "and in those counties bordering on the Missouri river, except the counties of Bon Homme, Yankton, Clay, and Union."

Buffalo county does border on the Missouri river, and is not one of the excepted counties.

Section 26, c. 16, Laws 1873, makes its west boundary the river.

The claim is made that, because that part of the county is Indian reservation, it is not one of the counties bordering on the river. Buffalo county is a creation of the statute. If there is any such territorial subdivision as Buffalo county, it is because the legislature has specifically marked out and bounded a certain parcel of its territory, and named it "Buffalo County." The legislature only can do it. They have done it by the chapter and section above quoted.

This court has no authority to erect a new Buffalo county, or define new boundaries for the one already created.

This is not a question of the authority of the legislature over an Indian reservation, nor whether this registry law is in operation on the reservation, but whether the fact that a strip of land on the west side of Buffalo county, and contiguous to the river, which is reservation, prevents the application of the registry law to the balance of the county.

THOMAS, J. The record in this case shows that there was held on the 2d day of November, 1886, in Buffalo county, Dak., a general election, at which time there was also held an election to determine the county-seat of said county. A count and canvass of the votes, as shown by the return of the canvassing

board, resulted in favor of Buffalo Center as the place of said county-seat.

This contest is organized for the purpose of declaring said election void. On the 28th day of February, 1887, this action was tried by the court below, upon an agreed statement of facts. The court, after making its findings of fact and conclusions of law, rendered a judgment that Gann Valley, and not Buffalo Center, was the county-seat of said county. To reverse this judgment, this appeal is prosecuted.

There is no dispute as to the facts of the case, and there are but three questions presented for our consideration, to-wit: Was the registration law of the territory valid? Was it in force in Buffalo county? Was it complied with by the officers of the election and the electors, at said election, in such a manner as to render said election valid?

In determining the first question, we must recur to the organic act of the territory, and see what power it confers upon the legislature of the territory in reference to fixing the qualifications of voters. We find, upon an examination of its provisions, that the power to prescribe the qualifications of voters is expressly conferred upon that body. Organic Law, § 1860.

Under the power thus conferred by the congress of the United States, the legislature, after prescribing various qualifications for voters, says that, in addition to such qualifications, all persons who "shall have complied with the provisions of any law which is now or may in the future be in force relating to the registration of voters, shall be entitled to vote." Section 47, c. 27, Rev. Codes.

The legislature subsequently enacted a law "relating to the registration of voters," in which it provides for boards of registration in towns, cities, wards, and precincts, who shall meet on Tuesday, two weeks prior to any general election, and make a list of all persons qualified to vote at the ensuing election whose names are known to them to be electors in said precinct, or who shall make application to said board to be registered, and found to be electors in said precinct. Laws 1881, c. 122.

This registration is made, by the law above quoted, a qualification which the elector must possess before he will be entitled to vote—not a mere regulation, as it is in some of the states having laws on this subject. But the voter has another means within his power to become qualified in case he has failed to comply with the registry law. He can do this by furnishing to the judges of election, at the time of offering his vote, his affidavit in writing, stating that he is an inhabitant of said precinct, and resides therein, giving his place of residence and the length of time he has so resided there; and also by proving, by the oath of a householder and registered voter of the precinct in which he offers to vote, that he knows such person to be an inhabitant of the precinct, giving his place of residence therein. Laws 1881, c. 122, § 8.

To be entitled to vote, one or other of these requirements must be met by the elector, and a failure to do so renders him disqualified to exercise the right of suffrage. If the law in this regard were intended as a mere regulation, instead of a qualification, the rule would not be so strict. But, in our opinion, it makes the compliance with the requirements of this law just as essential to the qualification of a voter in this territory as the attainment of majority, or the time of residence in the territory and precinct.

It is alleged by the contestant and respondent, and admitted by the appellants, that there was no such thing as a registry made by the officers; and, in its absence, not an affidavit of a single voter was offered by him at the time of voting, and not the slightest effort was made by either the officers of election or the voters to comply with the law in this regard.

We hold that one or the other of these requirements must be complied with before the elector can cast a legal ballot.

But the appellants seek to avoid the operation of the registry law by claiming that, under section 15 of the registry act of 1881, Buffalo county is exempt therefrom, because said county does not border on the Missouri river. The act, by its terms, applies only to certain specified counties, and "those counties

bordering on the Missouri river, except the counties of Bon Homme, Yankton, Clay, and Union."

The act of 1873, c. 16, § 26, bounds Buffalo county by the Missouri river. But appellants contend that, because that portion of Buffalo county bordering on said river is Indian reservation, said county does not extend to said river. Counties are the creatures of statute; and, as the law creating Buffalo county extends it to and bounds it on one of its sides by the Missouri river, the position taken by counsel for appellants, that it is not so bounded, is clearly untenable. The fact that a portion of the county is Indian reservation cannot and does not, in our opinion, change the boundary thereof.

We are therefore of the opinion that the registry law of this territory is valid, and a compliance therewith constitutes a qualification of suffrage; that Buffalo county is not exempt from its provisions, and that the law was in no respect adhered to or complied with in the said election; and that said election was consequently void and of no effect. The judgment of the district court is in all things affirmed.

All the justices concurring.

LANGNESS, Appellant, v. PETTIGREW, Respondent.

1. Waters and Water-Courses — Evidence—Apparent and Efficient Head.

In an action for damages in exceeding a right to construct a dam for a water-power of a certain number of feet head, where the difference at the trial was the method to be employed in measuring the number of feet head, the distinction between the general or apparent and the efficient head of water-power is immaterial; it appearing no such distinction was known or recognized at the time of the grant between the parties.

2. Same—Special Finding—Instructions.

In an action for overflowing lands in excess of a grant to construct a "dam to be for a water-power of eight feet head," where the differ-

ence at the trial was the method of measuring the number of feet head, — whether it was by taking the difference between the water level above the dam and that below in the tail-race under the wheel, when the water was quiet, and the mill not in operation, or when it was running,—the question for a special finding: "At an ordinary stage of water, was there more than eight feet difference between the level of the water in the pond above the mill-wheel and the level of the water below the mill-wheel in the race, while the mill is in operation?"—is proper and material. It did not have the effect of instructing the jury to ascertain the number of feet head by one method, when the court in its charge called attention to both, and told them they were to ascertain the proper one from the evidence before them.

3. Same—Trial.

In an action for damage in having exceeded a right to construct a "dam * * * eight feet high from a certain rock at the edge of the river where the dam crosses," it was proper to submit to the jury, for a special finding of fact, the question: "Was the dam erected more than eight feet high from the point of the rock designated in the deed?" It did not inform them "the point of the rock" from which to make the measurement, though none was named in the deed.

(Argued May 11, 1887; affirmed May 26; opinion filed February 14, 1888.)

Appeal from the district court of Minnehaha county; Hon. C. S. PALMER, Judge.

Wynn & Young, for appellant.

Two material issues were made by the pleadings:

1. Had the defendant, Pettigrew, built a dam in a manner that exceeded the restriction in the deed?

2. Were the lands of the plaintiff, Langness, overflowed and damaged by reason of the defendant building a mill-dam in a manner exceeding said restriction?

In addition to this, it appears by the record the construction of the clause in the deed was a subject of controversy.

The court erred in excluding the testimony of R. S. Alexander as to the difference between the general and efficient head of water-power.

The main question is the proper method of determining the number of feet head of water-power. It appears by the evidence two distinct modes of determining this were urged on the trial.

It appears that there is a difference between the general and efficient head. This witness states that he can explain the difference, and his competency is shown. "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." C. C. § 938.

The actual and efficient water head also varies. Plaintiff's witnesses testify to the general head of water-power as shown by the height of the dam. Now, was it the general or efficient water-power that was contemplated in the deed in question, and which rule of measurement should be applied in this case? The court would not permit plaintiff to show the difference between the two. It is only by evidence of this character that the jury could intelligently and justly ascertain the true principle of measurement to be applied.

The appellant further insists that there was error in the submission of the special findings to the jury.

The questions were objectionable in form. The first was limited to an ordinary stage of water, and there was nothing in the evidence by which the jury could find the number of feet head of water-power at an ordinary stage of water, except in the evidence of defendant's witness. By the plaintiff's theory and mode of measurement the number of feet head of water-power would be the same at any stage of water. The limitation in the question, "at an ordinary stage of water," was suggestive at once of the defendant's theory of measurement.

Again, the second question was objectionable in form. "Was the dam more than eight feet from the point of the rock designated in the deed from Langness to Pettigrew?"

No point of a rock was designated in said deed. The controverted clause is as follows: "Said dam to be for a water-power of eight feet head, or eight feet from a certain rock at the edge of the river where the dam crosses."

The first question was not pertinent or material to any of the issues, and could determine no issuable fact.

The serious error in submitting this question to the jury was that it instructed them to ascertain the number of feet head

of water-power by the mode of measurement urged by the defendant.

Its submission to the jury was material error, as its effect would be to press upon their minds the mode of measurement urged by the defendant, and that it was the correct one. *Hawley v. Chicago, B. & Q. R. Co.*, 29 N. W. Rep. 87.

An instruction which assumes as correct one of two aspects of the case, upon which there is conflict in testimony, or which gives prominence to certain facts, ignoring other facts of equal importance, is erroneous. *Watson v. Gray*, *43 N. Y. 385; *Le Roy v. Park F. Ins. Co.*, 39 N. Y. 56; *Downs v. Sprague*, *41 N. Y. 57; *Calef v. Thompson*, 81 Ill. 478; *Westchester F. I. Co. v. Earle*, 33 Mich. 143; *Jones v. Jones*, 57 Mo. 138.

L. S. Swezey, for respondent.

The inquiry of the witness Alexander was not upon any point in issue, and is irrelevant, incompetent, and immaterial. It is much involved and complicated. It includes the descriptive words "general," "apparent," "efficient" head of water-power. "General" means (1) pertaining to a class or order; (2) comprehending many things or persons; (3) not restrained or limited to any precise import, not specific, lax in signification,—as a general expression. "Apparent" means (1) capable of being seen, visible to the eye, within sight or view; (2) appearing to the view, but not real. "Efficient" means causing effects, producing results, operative. Webster.

The party could not be prejudiced by a ruling of the court concluding such an inquiry. And there was no offer or explanation to show by such inquiry what was expected or proposed to be proved.

The form of the special verdict was in accord with the evidence and the law of the case.

The suggestion of counsel that the second question submitted to the jury is objectionable in form, in the words, "point of the rock," is not well made; for all the evidence on the subject of

the rock designated in the deed, on both sides, tends to explain and make certain the point of the rock mentioned in the deed, and there is no dispute about that.

The other objections to the submission of those questions may be considered together. They seem to be predicated on the theory that the mere submission of a question to the jury, to be answered "yes" or "no," is in the nature of an instruction or direction to the jury; in effect is a sort of duress "upon their minds," as argued by counsel. This is a misapprehension, or a misstatement of the matter.

We have examined the cases cited by counsel on this subject, and do not find them authority against the action of the court.

THOMAS, J. This is an action for damages. The complaint alleges that on the 26th of October, 1882, the plaintiff and his wife conveyed by deed to the defendant a small piece of land in Minnehaha county, describing it; and also the right to construct a dam upon or below the land thus conveyed for a water-power, and the right to flow or set back the water upon certain other lands of the plaintiff; "said dam to be for a water-power of eight-foot head, or eight feet high from a certain rock at the edge of the river where the dam crosses." The complaint further alleges that about the middle of December, 1882, the defendant constructed a dam at the point designated, but wrongfully constructed said dam to the height of nine feet ten inches, or so as to afford a water-power of nine feet ten inches head, thereby overflowing and damaging large tracts of plaintiff's lands, the which would not have been done had the dam been erected as provided in the deed; for which plaintiff claims damages to the sum of \$4,000.

The answer admits the execution and delivery of the deed, but alleges that all of the overflow and damage, if any, claimed by plaintiff, were the necessary and lawful result of the building of said dam pursuant to the deed; and further alleges that the cause of action did not accrue within two years from the commencement of the suit. The case was tried to a jury be-

low, and a verdict returned for the defendant, upon which judgment was rendered by the court dismissing the complaint, and for defendant's costs; to reverse which the appellant prosecutes this appeal.

Ten errors are set out in the record, only two of which are noticed in the brief of appellant, which are the only ones we deem it necessary to consider.

As stated in the brief of counsel for appellant, there are only two material issues of fact presented by the pleadings, to-wit: *First*, did the defendant's dam exceed or violate the grant as contained in the deed? *Second*, were the plaintiff's lands damaged by overflow by reason of such violation?

By the terms of the grant, the defendant had a right to build a dam for a water-power of eight-feet head, or eight feet high from a certain rock in the edge of the river where the dam crosses. As we have heretofore stated, appellant seeks a reversal of the judgment herein, upon two grounds, to-wit:

First, because the court below erred in excluding the testimony of R. S. Alexander, as to the difference between the general or apparent head of water-power, and the efficient head of water-power; *second*, the court erred in submitting the special findings to the jury.

It will be observed that the language of that clause in the deed granting the right to construct a dam of a given character is in the alternative, and upon the trial there seems to have been no dispute as to the right of defendant to choose whether his dam should be confined to a height of eight feet above a certain rock in the edge of the river, or whether it should be so built as to afford him a "water-power of eight-feet head," even though by so doing the dam should exceed the height of eight feet.

The question, as stated in appellant's brief, about which counsel most seriously differed on the trial below, was, what was the proper method of ascertaining the number of feet of head of water-power afforded by the dam? The plaintiff contended that the difference between the level of the water above the

dam and the level of the water below, or in the tail-race below the wheel when the water is quiet and the mill not in operation, was the correct rule of its ascertainment. The defendant insisted for the same rule, with the modification that the difference between these two levels of water should be measured when the mill is in operation.

To these two different methods of measurement much of the testimony was directed by the parties, respectively.

M. A. Stickney, one of the plaintiff's witnesses, stated that he had had many years of experience in mills run by water-power, and knew the usual mode of determining the number of feet head of water, and that it was determined by taking the difference between the level of the water directly above the dam and the level in the tail-race below the wheel when the water is quiet and the mill not in operation.

E. P. Adams, one of the defendant's witnesses, testified that he had had a good deal of experience in mills, and knew the proper mode of estimating the number of feet head of water-power, and that it was found by taking the difference between the level of the water in the pond above the dam and the level of the water below the wheel when the mill is in operation.

Other testimony was given to the same effect, and thus it will be observed that the jury had before them these two different modes of ascertaining the number of feet head of water-power; and it is admitted by appellant's counsel in their brief that these two modes of measurement give different results; and that, if the method contended for by defendant was adopted as the proper mode of determining the number of feet head of water-power, it would necessarily decide the case in defendant's favor, and *vice versa*, if the mode contended for by plaintiff was adopted.

Appellant's counsel urge as error the refusal of the court below to permit them to show, by one of plaintiff's witnesses, the "difference between the general or apparent head of water-power and the efficient head of water-power;" an objection to

this testimony by counsel for defendant having been sustained by the court.

Was this error? In what way was this testimony material to the issues being tried? What light could its answer throw upon the question as to the proper method of measurement of the head of water-power afforded by defendant's dam? It nowhere appears that, at the time the deed was executed by the plaintiff, or at any time afterwards, any distinction was known or recognized between the general or apparent and efficient head of water-power. No reason is given or shown for attempting to elicit this information. The terms "general or apparent" have no necessary or natural connection with the subject. They are indefinite, confusing, and much involved, and immaterial to the question being presented to the jury. It was the actual or efficient head of water-power of this dam that was the subject of investigation upon the trial. There appears no reason anywhere in the record for confining the defendant to the "general or apparent head of water-power" in the erection of his dam. The language of the deed, the evidence, and the facts in this case, fail to show any such intention on the part of either of the parties. It seems to us from the very nature of the grant, and ultimate purpose for which the dam was to be used, it was certainly the actual and efficient head of water-power which was intended to be conveyed,—not the "general or apparent" water-power. It is not the "general or apparent head of water-power" that turns the wheel of the mills, but the actual and efficient head of water-power that does the work. Why not as well seek for the estimated or supposed head of water-power? The objection to the introduction of this evidence was properly sustained.

The remaining reason urged by counsel for appellant for reversal of the judgment herein is the submission by the court to the jury of two special findings, to-wit:

"(1) At an ordinary stage of water, was there more than eight feet difference between the level of the water in the pond above the mill-wheel and the level of the water below the mill-wheel in the race while the mill is in operation?

"(2) Was the dam erected more than eight feet high from the point of rock designated in the deed from Langness to Pettigrew?"

The first question was answered by the jury in the affirmative. The appellant's counsel insist that these questions were objectionable in form; that the first question was not material, and that it virtually instructed the jury to ascertain the head of water-power by the mode of measurement urged by the defendant; and the effect upon the jury was to impress upon them this mode as the correct one. This might seem somewhat plausible, were it not for the fact that the court in its charge called especial attention of the jury to the two different methods contended for by the parties, and told them that they were to ascertain the proper method from the evidence before them.

How can it be said that this question was immaterial? It presented one of the very questions of fact which the jury were trying to ascertain, and the submission of a particular question of fact to the jury did not amount to an instruction by the court that this was the law of the case on that point. The court had a right to submit it to the jury. Code Civil Proc. § 261.

The objection to the second question goes to the form, by reason of the fact that reference is made therein to "the point of the rock," because no point of a rock was designated in the deed. The words in the deed are "eight feet high from a certain rock." This rock is shown by the testimony to have length, breadth, and thickness in common with all rocks, and an uneven surface on top, and from some point on this surface the measurement of the height of the dam was to be made, as shown by the evidence. That point was for the jury to find, if necessary; and the mere insertion of the words "a point of the rock" did not tell them what point of the rock, but left it for the jury to say what part or point of the surface of the rock was the proper one from which to make the measurement. We find no error in this case. The judgment is therefore affirmed.

All the justices concurring.

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**NATIONAL TUBE-WORKS Co., Respondent, v. CITY OF CHAMBERLAIN,
Appellant.**

1. Municipal Corporations—Contract without Ordinance.

Where a city had the power to construct a system of water-works, it was not necessary that its council, before entering into a contract with reference to it, should have passed an ordinance authorizing the works to be constructed, or the contract to be made, when the charter did not require it.

2. Same—Liability—Ratification.

Though a contract made by a city should have been preceded by an ordinance, still, where the city retains the benefit, it will not be permitted to object that it was not empowered to make the contract simply because the manner of entering into it was not strictly in accordance with the mode prescribed by the charter, where it was not *ultra vires*.

3. Same.

Although there may be a defect of power in a corporation to make a contract, yet, if one made by it is not in violation of its charter, or any statute prohibiting it, and the corporation has induced a party to expend money or perform his part, the corporation is liable on it.

4. Trial—Findings—Omission of Judge's Signature.

Where the judge omitted to sign the findings of fact and conclusions of law, but the record shows they are made a part of the judgment roll, referred to in the judgment, and are preceded by the declaration of the judge, "In this action, tried before the court, I make and file the following findings of fact and conclusions of law," and, following this one record to the end, it is found who made them, by seeing the signature of the judge, *videlicet* he did make and file findings of fact and conclusions of law.

5. Judgment—Rendered Out District—Nature—Proof.

When the record shows that the judgment was rendered in the district where the action was pending, *aliunde* statements in contradiction thereof will not be considered.

(Argued May 28, 1887; affirmed May 26; opinion filed February 15, 1888.)

Appeal from the district court for the county of Brule; Hon.
L. K. CHURCH, Judge.

Stroube & Drury, for appellant.

Referring to section 269 of the Code of Civil Procedure, we find that the judge must either adopt as his own the findings of

facts that have already been prepared by his directions, or else he must himself prepare the findings. What purports to be the findings of facts in this case are not signed by the judge, nor is there any other sign or mark of authority about them to show that they have even been presented to him, or that his attention has in any way ever been called to them.

Again, the records in this case will show that the cause was tried on the 22d day of September, 1886, before the Hon. LOUIS K. CHURCH, in the county of Brule; that the order for judgment was signed on the 6th day of January, 1887, the Hon. LOUIS K. CHURCH being at the time of the signing of said order for judgment the presiding judge of the Fifth judicial district of the territory, and not of the Second judicial district, in which is situated the subdivision of Brule county where the cause was tried.

Section 31 provides that these courts are always open for the entry of orders and judgments.

This section has been amended by adding thereto the following: "And the judge may hear and determine the same, and make an order in vacation, at any place within his district." Sess. Laws 1881, p. 40.

This cause was determined on the 6th of January, 1887, in vacation, and not at a regular term of the district court. These proceedings were had outside of the judicial district in which the same was tried, and by a judge not of the Second judicial district.

No ordinance was ever passed for the construction of water-works.

The question is, does the charter require an ordinance, resolution, or law of the city to be passed and published, in order to bind the corporation?

The charter provides, (section 7:) "The city council shall have power to enact any and all ordinances necessary to carry into effect the powers herein granted." One of the powers herein granted is for the city council to construct and maintain water-works. It would seem, then, that the city council has the

power to construct and maintain water-works in said city by first enacting the necessary ordinances for that purpose.

"It must follow that, if in any case a party assumes to deal with a corporation on the supposition that it possesses powers which it does not, or to contract in any other manner than is permitted by the charter, he will not be allowed, notwithstanding he may have complied with the undertaking on his part, to maintain a suit against the corporation based upon its unauthorized action." *Cooley*, Const. Lim. 196; 7 Pac. Rep. 14, and cases cited; *Zottman v. City of San Francisco*, 20 Cal. 96; in *Herzo v. San Francisco*, 33 Cal. 145.

Where the mode of contracting is specially and plainly prescribed and limited, that mode is exclusive. 1 *Dillon*, Mun. Cor. 465.

"Where the corporation can only act by ordinance, the ratification must be by ordinance." 1 *Dillon*, Mun. Cor. p. 481, § 387, and foot-notes.

Goodykoontz, Kellam & Porter, and *George C. Squires*, for respondent.

Where the power to do certain acts is conferred upon the council, but the particular mode of exercising the power is not prescribed, any mode may be adopted which does not infringe the charter or general law of the land. 1 *Dillon*, Mun. Corp. § 244, n; § 58. .

If no mode be prescribed, the body corporate, within the compass of its powers, may enter into contracts just as a natural person may make like contracts. 4 *Waite*, Actions & Defenses, 603; *Baker v. Johnson Co.*, 33 Ia. 151; *Mayor v. Second Ave. R. R. Co.*, 32 N. Y. 261.

The passage of an ordinance by the city council would add nothing to their power. That they got from the charter, and it was full and complete "to construct and maintain water-works."

The power to construct carried with it the power to make whatever contracts were necessary for its execution.

In the exercise of this power to contract, no particular mode being prescribed in the charter, the essential question is not as to the precise form which their action took, whether that of ordinance, resolution, or vote, but did the council consider and pass upon the precise matter in substance and form covered by the contract? *Greene v. City of Cape May*, 41 N. J. Law, 45; *City of Quincy v. Chicago, B. & Q. R. Co.*, 92 Ill. 21; *Messenger v. City of Buffalo*, 21 N. Y. 196.

Certain of the powers granted by the charter to the council can only be properly executed by the exercise of its legislative authority, by means of ordinances; but such powers are quite distinct from others which might be termed "administrative."

The general powers of the city council to govern the city, to protect the people from disease, nuisance, fire, etc., call for and require legislation by the council. Many of these powers could not be reasonably executed without action by the council in the form of municipal laws or ordinances. But to do an act specifically authorized by the charter is an exercise of the administrative or executive power of the council only, and requires no intervention of its legislative functions.

The council is authorized to audit and allow claims against the city. Section 7, subd. 26. A claim being submitted and found correct, can it be passed upon and allowed only after being made the subject of an ordinance passed in due form and properly published, as provided in section 9 of the charter?

This distinction is important. See *Indianapolis v. Indianapolis Gas Co.*, 66 Ind. 396.

But, conceding even that an ordinance by the city council should have preceded this contract, and that there was a technical lack of power in the council to make the contract, still, the defendant having received and retained the benefits of the contract at the expense of plaintiff, "it cannot object that it was not empowered to perform what it promised in return in the mode in which it promised to perform." *Hitchcock v. Galveston*, 96

U. S. 341; *Moore v. Mayor et al.*, 73 N. Y. 238; *Allegheny City v. McClurken*, 14 Pa. 81; *State Bd. of Agriculture v. Citizens-St. R. Co.*, 47 Ind. 407; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

The action of the council in making this contract, although technically unauthorized, is subject to ratification; and the evidence indisputably shows that such action was repeatedly recognized and ratified. 1 Dillon, Mun. Cor. § 385; *Peterson v. Mayor et al. of N. Y.*, 17 N. Y. 449; *Hoyt v. Thompson's Executors*, 19 N. Y. 207; *Dubuque College v. Township, etc.*, 13 Iowa, 555; *Moore v. Mayor, etc., of N. Y.*, 73 N. Y. 246. See, also, *Knox Co. v. Aspenwall*, 21 How. 539; *Moran v. Commissioners*, 2 Black, 722; *Marsh v. Fulton Co.*, 10 Wall. 676.

The claim that no findings were made and filed as required by law rests entirely upon the fact that the statement purporting to be such was not signed by the trial judge.

It is not claimed but that the statement filed, if properly signed, would be adequate.

While it doubtless is the usual practice, neither statute nor rule of court requires the statement to be signed by the court or judge, nor do we find any case holding it necessary. It must be "in writing, and filed with the clerk," (section 266,) and in this respect the requirement of the statute is fully complied with.

The findings appear as a part of the judgment roll, and immediately precede the judgment. The judgment, in its terms, follows the findings, and expressly refers to them as the findings and decision on which the judgment is rendered.

THOMAS, J. This action was instituted by the plaintiff upon a warrant issued to it by the city of Chamberlain for the sum of \$1,600, bearing date the 15th of December, 1883, the consideration for which was certain pipes used in the construction of water-works in and by said city. The court found the purchase by the city, the delivery of the pipes, the acceptance and appropriation of them in the construction of its water-works.

and the continued and present use of them by said city; and the proof shows that on the 24th day of October, 1884, there was paid on said warrant by the said city the sum of \$75.

There is no controversy about the facts, but the claim was resisted below on the alleged ground that the city had no authority to contract for said articles without having first passed an ordinance by the city council authorizing it to be done.

The case was tried to the court, by consent, without a jury, and judgment rendered in favor of the plaintiff. It is sought by appellant to reverse that judgment in this court upon three grounds, to-wit:

1. That the city council of Chamberlain did not pass an ordinance authorizing the construction of water-works, or the purchase of the articles for which said warrant was given.
2. That the judge who tried the case below made no findings of fact or conclusions of law preceding the judgment.
3. That the judgment was not rendered in the district in which the case was pending and tried.

As to the first point it is admitted that there was no ordinance passed by the city council on the subject of erecting water-works, or the purchase of material therefor. The question then is, was it necessary that such should have been done in order for the city council to make the contract sued on?

An ordinance is simply another name for a law or statute, except that it is an enactment of an inferior legislative body, such as a city council. The corporation derives its authority from the statute creating it, and can confer no authority upon itself by the enactment of an ordinance.

The powers and duties of the city council of the city of Chamberlain are of two kinds,—legislative and administrative; legislative, to pass laws for the general government of the people within its corporate limits; administrative, to transact the business and financial affairs of the city, and make and enter into contracts to that end.

This is not strictly a question of *ultra vires*, for it is admitted that the city council has the power, under the charter, to build

and maintain a system of water-works, and contract for that purpose. But counsel for appellant insists that, before such authority could be exercised, it was necessary to pass an ordinance for that purpose.

This might be true if the city charter put such a limitation upon the powers of the council on this subject, expressed or implied. After a careful examination of that instrument we find no such limitation, and therefore conclude that it was unnecessary that an ordinance should have been enacted. *Gas Co. v. San Francisco*, 9 Cal. 453; *Green v. City of Cape May*, 41 N. J. Law, 45; *City of Quincy v. Railroad Co.*, 92 Ill. 21; *Messenger v. City of Buffalo*, 21 N. Y. 196.

But conceding that an ordinance of the city council should have preceded this contract, and that there was, for this reason, a technical want of power to make it, still the appellant received and retained the property of the respondent furnished at its instance and request, and enjoyed the use and benefit thereof. It cannot, therefore, be heard to object that it was not empowered to do what it promised in return, simply because the manner of entering into the contract was not strictly in accordance with the mode prescribed by its charter, but not *ultra vires* as to its provisions. *Hitchcock v. Galveston*, 96 U. S. 341; *Moore v. Mayor*, 73 N. Y. 238; *Board, etc., v. Railway Co.*, 47 Ind. 407. In the case last cited the court says: "Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise, and in the execution of the contract, to expend money, and perform his part thereof, the corporation is liable on the contract."

This seems to us to be a correct statement of the law, and fully embraces within its scope the questions arising in the case at bar. Hence we conclude that the city of Chamberlain, having induced the respondent by its promise, through the action of its council, to part with its property in the performance of its part of a contract not in violation of the corporate

charter, is liable to the respondent for the value of said property on the contract. To hold otherwise would, in our opinion, be to subvert the law, and do violence to every principle of equity and justice.

The answer to the second objection is that the judge did make and file findings of fact and conclusions of law, and the same are "in writing, and filed with the clerk as required by law."

It is upon the alleged failure of the judge to affix his signature to the findings and conclusions of law that counsel for appellant contend that there are no such findings and conclusions of law made by the judge.

The record shows that the findings of fact and conclusions of law are made a part of the judgment roll, are located preliminary to the judgment itself, are referred to in the judgment, and the findings of fact, conclusions of law, and judgment are all preceded by the following declaration made by the judge: "In this action, tried before the court, I make and file the following findings of fact and conclusions of law." By following these and the judgment to the end, we ascertain who has made them by seeing the signature of the judge attached thereto. They are all part of one record, and are signed by the judge of the court. The point is not well taken.

In the third and last objection it is contended by counsel for appellant that the "judgment was not rendered within the district wherein the cause was pending and tried." This statement seems to be based upon facts *aliunde* the record, for the record discloses the fact that the judgment was rendered in the district in which the cause was pending and tried. It is by the record that we are governed, and *aliunde* statements in contradiction thereof cannot be considered.

The judgment of the district court is in all things affirmed.
All the justices concurring.

PHILLIP BEST BREWING Co., Respondent, v. PILLSBURY &
HURLBUT ELEVATOR Co., Appellant.

1. Appeal—Review—Findings—Sufficiency of Evidence.

A finding of the trial court upon conflicting testimony will not be disturbed, even when it is against the weight of evidence.

2. Chattel Mortgage—Conversion of the Property, What Constitutes.

C., having executed to plaintiff a chattel mortgage on certain growing wheat, deposited it, (after harvest, and before the maturity of the mortgage,) in the defendant's elevator, where it was mingled with other wheat belonging to various parties; C. receiving, according to custom, "warehouse" receipts therefor. These he afterwards sold. Upon their presentation defendant shipped out of the territory to their owner the amount of wheat called for by them. *Held*, the defendant was liable to the plaintiff, whose mortgage had been duly registered, for the value of the wheat.

(Argued February 9, 1887; affirmed February 16; opinion filed February 15, 1888.)

Appeal from the district court of Grand Forks county; Hon. W. B. McCONNELL, Judge.

G. E. Cole, Bangs & Cochran, and Wilson, Ball & Wallin, for appellant.

The mortgage covers only such crops as were in existence at the date of its execution, and does not purport to embrace crops to be sown subsequent thereto.

The testimony shows that the property pretended to be mortgaged had no existence when the mortgage was made.

There was no agreement in the mortgage that the mortgagee should have a lien upon crops to be sown or property to be acquired subsequent to the execution of the mortgage. An express agreement was necessary in order to hold future acquisitions. *Jones*, Chat. Mor. § 167; *Cressy v. Salsu*, 17 Hun, (N. Y.) 120; *Montgomery v. Chase*, 14 N. W. Rep. 586; *Pennington v. Jones*, 10 N. W. Rep. 274.

The property having no existence when the mortgage was executed, it could not be situated in the county where the mortgage was made, and hence the filing did not operate as notice to good-faith purchasers. C. C. §§ 1744, 1745; Jones, 157; *Jones v. Richardson*, 10 Met. 481.

The case of *Nichols v. Barnes*, (Dak.) 14 N. W. Rep. 110, is not in conflict with our position. That was of existing property, viz., growing crops, and the only question was whether the description was sufficient to identify the grain. The court held it was.

The plaintiff failed to show that the grain raised on this tract of land was delivered or sold to the defendant.

Nor is there a particle of testimony in the case tending to show that defendant issued the Cline tickets.

The defendant was, as to the plaintiff, a mere bailee, and before it had any notice of any claim or lien of the plaintiff, Cline having sold the wheat in store and delivered the wheat tickets to C. A. Pillsbury & Co., millers of Minneapolis, the defendant had duly delivered all the wheat in its possession to said Pillsbury & Co., the owners and bearers of said tickets, as it was lawfully bound to do; and there having been no demand while defendant was in a position to comply with it, the defendant has not been guilty of a conversion of the wheat, and cannot be held liable in this action. *Edwards, Bailments*, §§ 40, 70; *Hazzard v. Able*, 15 Abb. Pr. (N. S.) 413; *Parker v. Lombard*, 100 Mass. 405; *Nelson v. Iverson*, 17 Ala. 210; 41 Tex. 10.

The plaintiff must recover on the strength of its own title. The mortgage debt did not mature until November 1, 1883. See Jones, § 454; *Hathaway v. Brayman*, 42 N. Y. 322.

W. L. Wilder and J. D. O'Brien, for respondent.

The supreme court will not disturb the decision of the court below, where there is a conflict of evidence. This is a rule that, as Mr. Hayne remarks in his work on New Trial and Appeal, on page 857, "has been announced more frequently than any other

rule of practice." See cases cited. *Kiler v. Tubbs*, 32 Cal. 332; *Lick v. Matten*, 36 Cal. 213; *Wilson v. Fitch*, 41 Cal. 385; *Hill v. Smith*, 32 Cal. 167. The proof that the crop was sown on this land prior to the execution of the mortgage, and that the wheat mortgaged was sold to defendant, or went into its elevator, is ample.

They seek to escape liability under a theory that the law of bailment applies.

The finding of the court that the crop was sown and growing, disposes of this, for the filing of the mortgage in the proper office was notice to the defendant. *Nichols v. Barnes*, (Dak.) 14 N. W. Rep. 110.

A mortgage of this character is good. *Butt v. Ellett*, 19 Wall. 544; *Pennock v. Coe*, 23 How. 117; *Dunham v. Railway Co.*, 1 Wall. 254; *Sillers v. Lester*, 48 Miss. 513; *Mitchell v. Winslow*, 2 Story, 644.

The case of *Hathaway v. Brayman*, 42 N. Y. 322, cited by counsel as sustaining the theory that there had been no default, because the mortgage debt was not due, and that therefore the sale by Cline, and the purchase by defendant, does not constitute conversion, proves, upon examination, to have passed off under the peculiar language of the chattel mortgage in question.

From a critical examination of the above and many authorities there cited, it seems that the rule is well settled that, prior to forfeiture or breach of condition, the mortgagor has an interest in the mortgaged property which he may convey, without constituting conversion.

Applying this rule to the case at bar, it may be pertinent to inquire whether there was a breach of condition in the Cline mortgage when the wheat was sold to defendant.

An examination of the Cline mortgage will convince one that, at the instant of the deposit of the wheat in defendant's elevator there was a breach of condition, working a forfeiture, and that defendant was then and there a converter of that property.

Indeed, this is the law, as laid down by the Dakota decision, for the court holds that the mere fact of taking this wheat and mixing it with other wheat is a conversion, as to the mortgagee.

Defendant had put itself in a position where it would be utterly impossible to give to us the property mortgaged.

REPLY.

In the case of *Nichols v. Barnes*, the defendant not only mingled the wheat with other wheat, but purchased and sold it, and it was these joint acts which constituted the conversion.

Here the defendant is a mere warehouseman or bailee, and had delivered the wheat to the person to whom the bailor had transferred the warehouse receipts before any demand was made on him for the wheat.

This is not a conversion; but it was the transfer of the tickets by Cline, and putting the money in his pocket, that constituted it. *Cushing v. Breed*, 14 Allen, 376; *Nelson v. Brown*, (Ia.) 5 N. W. Rep. 719, bottom paging; *Abbott v. Grantham*, 4 N. W. Rep. 1090.

THOMAS, J. This action was instituted in the district court of Grand Forks county by the respondent, a private corporation, against the appellant, also a private corporation, for the alleged conversion of a quantity of wheat of which the respondent claimed to be the owner, by reason of a chattel mortgage executed and delivered to it by one H. H. Cline, on the 1st day of May, 1883, the which was duly recorded in the office of the register of deeds of Grand Forks county, on the 28th day of May, 1883.

The mortgage was regular as to form, and purported to convey to respondent "all that crop of small grain, wheat, and oats, either or both, now growing on the north-west quarter of section thirty-two, township one hundred and fifty-two, and range fifty-one," and describing land owned by one Dr. Scott, and situated in said county.

The cause was tried by the court, a jury having been waived
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by both parties in open court. The trial resulted in the rendition of judgment for the respondent for the sum of \$792.21, with interest, costs, and disbursements.

In due time and manner appellant moved the court below for a new trial, based on a statement of the case containing exceptions and all the evidence. The motion was overruled, and the appellant brings the case here for review, and seeks to have the order denying a new trial set aside, and the judgment reversed, in support of which he assigns numerous errors, but chiefly relies on the following :

First. The mortgage covers only such crops as were in existence at the date of its execution. That there was no proof that the wheat mentioned in said mortgage was sown or *in esse* at the date of the mortgage, and the court erred in so finding.

Second. That the court erred in finding 'that during the month of September, 1883, and between the 10th and 29th of said month, the defendant took, converted, and carried away all of said wheat, of the value aforesaid, and converted the same to its own use, and mixed the same in an indiscriminate mass of other wheat.'

Third. That appellant was a mere bailee, without notice, and delivered the wheat to the vendee of Cline, the bailor, as was its duty to do under the law."

The first objection raised by the appellant presents two points for our consideration; but as the first may be settled by a determination of the latter, we deem it necessary to consider the latter only. In this it is contended by counsel for appellant that there is no sufficient proof to warrant the court below in finding as a fact that the wheat was sown or growing at the date of the mortgage.

It is a well-established rule, and one more frequently announced than almost any other, that courts of last resort will not set aside or disturb a verdict of a jury, or a finding of a court when acting in the place of a jury, when it appears from the record that there was evidence on the point thus determined substantially tending to support it. In other words, the supreme court

will not disturb a finding of the court below where the testimony concerning it is conflicting, even when in the opinion of the court it is against the weight of the evidence. *Kile v. Tubbs*, 32 Cal. 332; *Lick v. Madden*, 36 Cal. 213; *Caulfield v. Bogle*, 2 Dak. 464. In the latter case the learned judge, in delivering the opinion of a unanimous court, says: "It may be, as claimed by the counsel for the appellant, that the finding of the court is contrary to the weight of testimony, but it cannot be denied that there was some evidence to sustain the findings. Of the credibility of this evidence the court below, acting as the jury, was the sole judge. To set aside his findings because we might have found the other way, had we occupied his place, would be to substitute our judgment for his upon a question of fact, which, as this court has uniformly held, we cannot do."

This is a clear and correct statement of the rule, and we, being satisfied from an examination of the testimony as contained in the record that there was some evidence which substantially tended to support the findings of the court below on this point, cannot therefore disturb it. This view renders it entirely unnecessary to discuss the first proposition embraced in this objection.

The findings of the court embraced in the second ground of objection is a question of mixed law and fact. As to the findings of fact as contained therein the objection is disposed of in like manner as the first, and for similar reasons; that is, there is sufficient evidence to sustain them. The question of conversion is one of law, depending upon certain facts, and a determination of this necessarily involves a consideration and discussion of the last and third objection herein, that the appellant was a mere bailee, without notice, etc. The proof shows, and it was so found by the court, that the appellant was the owner and keeper of an elevator at Ojata, a railroad station in the county of Grand Forks, in the neighborhood of where the mortgaged wheat was grown; that it was the custom of appellant to receive wheat into its elevator from any one who desired to deliver it; that on the receipt of wheat it was deposited in the

warehouse or elevator in such a manner as to become mixed with the mass of wheat belonging to appellant or other parties. The wheat in controversy was delivered and deposited in the warehouse of appellant by H. H. Cline, the mortgagor, and it thus became mixed by the appellant with a large mass of its own or other parties' wheat. Tickets or vouchers were issued by appellant to Cline, showing the quantity and quality of such wheat deposited by him. Cline, it seems, sold the vouchers to C. A. Pillsbury & Co., a firm of millers at Minneapolis, Minn. Appellant, upon the presentation of these tickets or "warehouse receipts" by said firm, shipped to them the quantity of wheat called for by these vouchers as aforesaid.

The mortgage on said wheat was not due at the time of the delivery to appellant by Cline, and it is therefore contended that it was no breach of the conditions of the mortgage, and therefore works no forfeiture.

The truth of this proposition depends upon the circumstances surrounding the transaction. If the transaction were a regular deposit by Cline, the mortgagor, appellant was a mere bailee, and it is not liable as such to respondent for the wheat, there being no breach of the conditions of the mortgage, and therefore no forfeiture, unless the appellant committed acts concerning said wheat that in law constitute a conversion. But if, as is shown by the proof and findings of the court in this case, the which we cannot disturb, the appellant, at the time or after it received the wheat, and with or without the consent of Cline, mixed it with an indiscriminate mass of other wheat of its own, thereby rendering it impossible of identification or reclamation by the respondent, and sold and shipped the same out of the country, it was not only such a breach of the terms of the mortgage that worked a forfeiture as to Cline, but was in law a conversion of the wheat by appellant to its own use; so far as the respondent is concerned. *Chase v. Washburn*, 1 Ohio St. 244; *Shepards v. Barnes*, (Dak.) 14 N. W. Rep. 110.

The appellant having converted the property in controversy by mixing and confusing it with his own, or that of others, and

having shipped it into a foreign state in this condition, there can be no doubt it is liable to respondent for the value thereof.

As said before, there are numerous other assignments of error set out by appellant in the record; but as they were not pressed on the attention of this court by counsel we have not deemed it necessary to notice them in detail, or to discuss them at length, but suffice it to say that after a careful examination of the entire record herein we find no errors that would warrant a reversal of the action of the district court in this cause. Hence the judgment is in all things affirmed.

All the justices concurring.

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43*	820

VOLKMAN, Respondent, v. CHICAGO, ST. P., M. & O. RY. CO., Appellant.

1. Railroads—Killing Stock—Burden of Proof—Section 679, C. C. Pro.

In an action against a railroad company for killing stock, proof of the killing, under section 679, C. C. Pro., providing that the killing shall be *prima facie* evidence of negligence of the company, the plaintiff need not prove more than the killing, but where the defendant, by its servants in charge of the train, shows that there was no negligence or want of ordinary care and skill, the *prima facie* case is overcome, and it devolves upon the plaintiff to affirmatively show that the defendant was guilty of gross negligence, or he cannot recover.

2. Same—Question of Law—Section 679, C. C. Pro.—Construction.

In an action against a railroad company for killing stock, the question as to when the *prima facie* case, under section 679, (providing that the killing shall be *prima facie* evidence of negligence of the company,) is overcome, is one of law for the court, and not of fact for the jury.

3. Same—Pleading—Appraisement—Section 680, C. C. Pro.

In an action against a railroad company for killing stock, it is not necessary to allege a compliance with section 680, C. C. Pro., providing for an appraisement of stock killed or injured. The provision is merely cumulative or permissive in its character, and a compliance with it is not a prerequisite to the institution of a suit.

(Argued May 11, 1887; reversed May 26; opinion filed February 15, 1888.)

Appeal from the district court of Minnehaha county; Hon. C. S. PALMER, Judge.

This action was to recover the value of a mare that had been killed on the defendant's track. The plaintiff had judgment below, and the defendant appealed.

The animal was killed at a bridge 105 or 107 rods west from a station called "Hartford," by a regular west-bound "mixed" train, on the evening of November 26, 1884. The train arrived at the station at 9:05 P. M., and left at 9:15 P. M.

The engineer testified that it was dark, foggy, and snowing at the time of the accident; that he was running at the usual rate of speed,—15 miles an hour. The engine had a proper headlight. He did not see the horse, though he was on the lookout. It was so foggy he did not think he could see more than 10 feet ahead. Ordinarily on a straight track one can see a telegraph pole and a half ahead. He knew from the jar he had struck something, but did not know it was an animal until he got to the next station, and examined his engine. He did not stop. He thought the animal was in the bridge, because he ran over it. If it had been standing on the track it would have been thrown off. It takes three or four minutes to go from the station to the bridge. The track is straight. He did not think an object as large as a man lying down on the bridge could be seen from the depot.

The fireman testified that he was on the tank of the engine at the time, and was not looking ahead. He felt the jar. Believed he was putting in fuel at the time. He remembered it was very foggy in places that night; before they got to Hartford.

The engineer's testimony as to its being foggy and snowing at the time of the accident was controverted on the rebuttal. There was also testimony that it was a starlight night, and that one in daylight, standing at the station at Hartford, could see an object as large as a man lying down on the bridge where the animal was killed.

Section 680, C. C. Pro., referred to in the opinion, provides

that "whenever any horses, cattle, or stock may be killed or crippled by any train of cars or locomotives upon any railway within this territory, it shall be lawful for the owner, * * * after first giving a station agent of the corporation * * * written notice of his intention, to apply to a justice of the peace * * *, to appoint appraisers to affix a value upon the horses, * * * and said justice shall appoint three discreet and disinterested citizens of the county a board of appraisers, who, * * * shall * * * affix a value upon the same, * * * and return to said justice * * * a written report, * * * setting out the valuation," etc.

H. H. Keith, for appellant.

The court erred in refusing to direct a verdict for defendant at the close of the testimony.

1. The plaintiff had entirely failed in her proof.
2. It was incumbent upon plaintiff to show that she had complied with section 680 of the Code of Civil Procedure.
3. The defendant completely met the requirements of the statute by showing that it was free from negligence or carelessness, and that the train was run with usual care and caution.

The accident, according to the testimony, was unavoidable; and when the defendant rested its case the burden of proof was then on the plaintiff, and, not having offered any evidence to show negligence, she cannot recover. *Wainscott v. L. & N. R. Co.*, 3 Bush, 149; *Packwood v. C., St. L. & N. O. R. Co.*, 7 Amer. & Eng. R. C. 584; *Tallot v. Ky. Cen. R. Co.*, 78 Ky. 621; *S. C. 7 Amer. & Eng. R. C. 585*; *Durham v. Wil. & W. R. Co.*, 82 N. C. 352.

The most that can be said of section 679 is that in the first instance the company must show how they were conducting the train, and the circumstances of the injury complained of, and that they were not careless or negligent in running the train. Having done this, they overcome the presumption against them, and the plaintiff is then required to prove negligence or carelessness on the part of the company.

Kentucky, Mississippi, Maryland, Arkansas, and North Carolina have the same statutes in reference to killing stock by railroad companies, and the supreme courts in each of these states have given such construction to them.

The general rule is that, in an action against a railroad company to recover damages for killing live-stock, the plaintiff must prove affirmatively that the want of care on the part of the company or its employes caused the injury.

Even in those states where the statute makes the killing of stock *prima facie* evidence of negligence on the part of the company, the courts have said that, but for such statutes, the rule would have been otherwise. Wood, R. L. § 422; Pierce, 428; *Talbot v. Ky. Cen. R. Co.*, 78 Ky. 621; *C., St. L. & N. O. R. Co. v. Packwood*, 7 Amer. & Eng. R. Cas. 588; *P. C. & St. L. R. Co. v. McMillan*, Id. 588; *Small v. C. R., I. & P. R. Co.*, 50 Ia. 338.

The weight of authority is to the effect that the plaintiff must show, affirmatively, negligence on the part of the defendant, and especially so when the property of the plaintiff is illegally on defendant's track, and a trespasser. *Ill. Cen. R. Co. v. Godfrey*, 71 Ill. 500; *Bemis v. Conn. & P. R. R. Co.*, 42 Vt. 375; *Maynard v. Boston & Me. R. R.*, 115 Mass. 458; *Atchison, T. & S. F. R. Co. v. Walton*, 9 Pac. Rep. 351; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Clark v. Syracuse & U. R. Co.*, 11 Barb. 112; *Terry v. N. Y. Cen. R. Co.*, 22 Barb. 574.

If the proof is all one way, either in favor of or against negligence, it is always a question of law. *Herring v. W. & R. R. Co.*, 51 Amer. Dec. 395; *Gonzales v. N. Y. & H. R. Co.*, 38 N. Y. 440; *Callahan v. Warne*, 40 Mo. 131.

If the evidence is equally consistent with the absence as with the existence of negligence, it is error to submit it to the jury. *Baulec v. N. Y. & H. R. Co.*, 59 N. Y. 357; *Wilds v. Hudson R. Co.*, 24 N. Y. 430; *Gonzales v. N. Y. & H. R. Co.*, 38 N. Y. 440; *P. C. & St. L. R. Co. v. McMillan*, 7 Amer. & Eng. R. Cas. 588.

It is held by the supreme court of the United States that where the evidence is insufficient to support a verdict for the plaintiff, and the appellate court would reverse the judgment

for that reason, the trial court should direct a verdict for defendant. *Schofield v. C., M. & St. P. R. Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125; *Randall v. B. & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Board of Co. Com. v. Clark*, 94 U. S. 278; *Grand Chute v. Winegar*, 15 Wall. 355; *Insurance Co. v. Baring*, 20 Wall. 159.

The court should direct a verdict when, if submitted to the jury, a contrary verdict would be set aside as against the weight of evidence, or contrary to law, or as without evidence to support it. *Stuart v. Simpson*, 1 Wend. 376; *Algur v. Gardner*, 54 N. Y. 360; *Godkin v. Bank*, 6 Duer, 76; *Dryden v. Britton*, 19 Wis. 22; *Lane v. Railroad Co.*, 14 Gray, 143; *Corning v. Troy Factory*, 44 N. Y. 577.

It is the settled law that, where the existence of a fact is clearly proved by the undisputed testimony, the court should hold the fact to be established, and it is error to leave to the jury whether or not the fact exists. *Railroad Co. v. Skinner*, 19 Pa. St. 298; *Story v. Brennan*, 15 N. Y. 524; *Poleman v. Johnson*, 84 Ill. 269; *Nichols v. Luce*, 7 Wend. 160.

When the testimony fails to make a case against the defendant, within the issue, it is the duty of the court to so instruct the jury. *Grand Trunk R. Co. v. Nichol*, 18 Mich. 170; *Hynds v. Hays*, 25 Ind. 31; *Parker v. Jinkens*, 3 Bush, 587; *Sheldon v. Hudson R. R. Co.*, 26 Barb. 226.

The appellate court will reverse a judgment and grant a new trial when the verdict of the jury is against the weight of evidence, even though there may have been some conflict in the testimony. Hayne, *New Trials & Appeals*, § 97; *Hawkins v. Reichert*, 28 Cal. 539; *Dickey v. Davis*, 39 Cal. 569; *Northern Pacific R. R. Co. v. Shimmel*, 9 Pac. Rep. 859; *Wilds v. Hudson River R. R. Co.*, 24 N. Y. 430.

The complaint of plaintiff did not allege facts sufficient to bring the action within the provisions of the statute.

The plaintiff cannot claim the protection of section 679 and ignore section 680.

The object of this section is to avoid tedious litigation. The Kentucky statute is similar to this, and under the decisions of

that state it seems to be a prerequisite to bringing an action of this kind that the plaintiff must first comply with the provisions of the statute.

Bailey & Davis, for respondent.

The proceedings provided by section 680, C. C. Pro., is not a condition precedent to the right of bringing an action. The language of the section plainly indicates this.

Further, such construction would render the section unconstitutional.

This is also a matter, from the value, not within the jurisdiction of a justice of the peace. Organic Law, § 1926. See *Mortimer v. Louisville & N. R. Co.*, 10 Bush, 485.

All the other points of difference can be resolved into a single substantial ground of objection, viz.: that the question of negligence under the evidence should not have been submitted to the jury.

The killing of the mare was established by the proof. This made a *prima facie* case for the plaintiff, under the provision of Section 679.

Whether this *prima facie* case was overcome by defendant's evidence is purely a question of the weight of evidence. The weight to be given evidence is a question for the jury. It is for them to say whether the *prima facie* case is overcome.

The question of negligence is for the jury, even upon undisputed evidence, unless the conclusion drawn from the facts is also indisputable. If different minds would draw different conclusions from the facts as established, the jury is the proper tribunal to settle the question. *Williams v. Nor. Pac. R. R. Co.*, 14 N. W. Rep. 97, S. C. 11 Amer. & Eng. Ry. Cas. 421; *Railroad Co. v. Stout*, 11 Wal. 663-665; *Western Maryland R. R. Co. v. Carter*, 11 Amer. & Eng. Ry. Cas. 482.

The jury were the sole judges of the credibility of the witnesses. It was for them to decide whether they testified truthfully. This is important upon the question whether there was a dense fog in that locality. The testimony of the engineer upon

this point is unreasonable. It is not in harmony with that of the fireman, who saw different tracts of fog. He only saw one, and no snow. *Little Rock & Ft. Smith Ry. Co. v. Finley*, 11 Amer. & Eng. Ry. Cas. 469.

His testimony was in conflict with that of three other witnesses.

It was certainly proper for the jury to settle this question. They evidently did not believe the "fog story."

If the fog is cleared away, it is practically an end of the defense on the question of negligence. The defense needed the cover of the fog to hide carelessness of the engineer. Without it there would be no excuse for his failure to see the mare, on this straight line of road, just starting from the depot at a rate of speed that took three or four minutes to go 105 rods. If he had been watchful, as was his duty, he could have prevented the accident. That he did not see the mare, and that the shock from striking her did not arrest his attention, are circumstances sufficient to warrant the verdict establishing inattention and negligence on his part.

THOMAS, J.¹ Plaintiff brought this suit in the district court of Minnehaha county to recover the value of a mare, which she alleges in her complaint was run over and killed by defendant's engine and cars, through the gross negligence of its servants and employes, who were in charge and control of said train of cars at the time of the accident.

The defendant, by its answer, puts in a general denial to the allegations of the complaint, and further alleges that its servants and agents were careful, prudent, and skillful in the management and running of said engine and train of cars on the occasion mentioned in the complaint.

The plaintiff proved the ownership and killing of the mare, and it was stipulated by both parties that the reasonable value of said mare was \$140.

The defendant, among other witnesses, introduced the engineer and fireman, who were in charge of the engine at the time of the killing of said mare, all of whose testimony was in

¹NOTE BY JUDGE THOMAS.—In the case of *Volkman v. Chicago, etc., Ry. Co.*, change the words, "negligence and want of ordinary care," so as to read, "gross negligence," wherever they occur in the opinion.

effect that there was no negligence or want of ordinary care or skill in the management of said engine and cars on the occasion referred to, but their evidence showed clearly that the killing was unavoidable.

The plaintiff then called one or two witnesses in rebuttal, but their testimony was immaterial, as it had no tendency to refute or contradict the evidence given by witnesses for defendant.

Both parties having rested, counsel for defendant moved the court to direct a verdict in its favor, because there was no evidence in the case tending to show negligence or want of ordinary care on the part of its agents or employes in the management of its engine and cars at the time of the killing of said mare. This was promptly overruled by the court, and thereupon, after the usual charge by the court, the case was submitted to the jury, who returned a verdict for the plaintiff for the sum of \$140, and judgment was entered in accordance therewith.

In due time defendant, by its counsel, filed grounds, and applied to the court to set aside said judgment, and grant a new trial, which was denied, and defendant prosecutes this appeal, seeking a reversal of the judgment, and in this behalf assigns numerous errors, among them "the refusal of the court to direct a verdict for defendant." This is the only error, perhaps, that we shall notice at length, as we think it strikes directly at the *raison d'être* of the judgment.

The plaintiff, by proving the killing of the mare, established a *prima facie* case under section 679 of the Code of Civil Procedure; and had defendant failed to introduce any proof, she would have been entitled to a verdict in her favor, under the direction of the court. But the defendant introduced its employes engaged in the running of the train at the time; and as their evidence shows no negligence, or want of ordinary care and skill, the *prima facie* case of plaintiff was overcome; and upon her failure to show affirmatively that defendant was guilty of gross negligence in the killing of said mare, she could not recover therefor.

It is clear that but for the statute (section 679 of the Code of Civil Procedure) the mere proof of the killing would not be sufficient to make a *prima facie* case.

As this section is in derogation of the rule at common law and the general rule of practice prescribed by our Code of Civil Procedure, it behooves us to consider the effect, scope, and object of this provision, in order to properly construe it. It seems to us that this section was enacted for the purpose of overcoming the difficulty, generally supposed to exist with plaintiffs in this kind of actions, in making proof of facts which are only known as a rule to the servants and agents of the defendant. Hence, when the railway company placed their servants and employes, in whose breasts these facts are presumed to rest, on the witness stand, and purged their consciences by testifying, under oath, touching all the facts and circumstances within their knowledge, concerning the killing or injury, the reason for the statute ceases. To hold otherwise would work great injustice and oppression, and would be to prescribe a different rule for the adjudication of rights of persons and property engaged in the railway business from that which obtains in reference to other persons whose rights of property are in nowise more sacred.

This view of the law seems to be in harmony with the decisions of the courts of last resort of all the states which have a similar statute on this subject. *Railroad Co. v. Wainscott*, 8 Bush, 149; *Railroad Co. v. Packwood*, 7 Amer. & Eng. R. Cas. 584; *Railroad Co. v. Talbot*, 78 Ky. 621; *Durham v. Railroad Co.*, 82 N. C. 352.

The position taken by counsel for plaintiff, that the question as to when the *prima facie* case is overcome is a question for the jury, is entirely untenable. It is clearly a question of law for the court.

The question raised by the counsel for defendant as to the necessity of alleging a compliance with section 680 of the Code of Civil Procedure, which provides for an appraisal or valuation of all stock killed or injured by railroad corporations in this territory, which question was raised by an objection in the

nature of a demurrer *ore tenus* in the court below, was properly overruled by said court. We regard the statute in question as merely cumulative and permissive in its character, and a compliance therewith is not a prerequisite to the institution of suits of this kind.

We are clearly of the opinion that the district court committed an error in refusing to grant counsel's motion to direct a verdict in favor of the defendant; hence the judgment is reversed.

All the justices concurring.

STUTSMAN COUNTY, Respondent, v. MANSFIELD *et al.*, Appellants.

1. Pleadings—Construction of Complaint on Objection to Evidence.

When it is objected to evidence at the trial that the complaint does not state facts sufficient to constitute a cause of action, a greater latitude of presumption may be indulged to sustain it, than when the same objection is made by demurrer.

2. Same—Complaint on Treasurer's Bond—Sufficiency.

A bond given by M. was "conditioned for the faithful and impartial discharge of the duties of the office of county treasurer, and a true and correct accounting for all moneys, credits, accounts, and property which should come into his hands, and a delivery of the same over according to law," etc. The complaint, in an action upon the bond, after averring non-performance of each of the conditions, alleged that M. did not pay over the balances in his hands to the territorial, county, and school-district officers upon receiving proper vouchers; that from taxes and other sources, as such treasurer, he had received \$9,232.84, over and above all moneys legally paid out; that the board of county commissioners had directed him to settle with them; that he neglected and refused so to do; that he had presented a statement showing the above balance, which he failed to account for or produce; that demand therefor had been made; that, having failed to pay said balance, the board directed suit to be instituted against him and his sureties; that afterwards the said board removed him from office, declared the same vacant, and appointed one W. to fill the vacancy thereby created. *Held*, that the complaint was good on an objection to evidence, that it did not state facts sufficient to constitute a cause of action under the rule applicable when the objection is raised in that form.

3. Same—Duty of Treasurer—Pol. C. c. 21, § 95; c. 5, § 14.

This complaint, under Pol. C. c. 21, § 95, requiring the treasurer to settle his accounts with the board of county commissioners when directed by them, and under chapter 5, § 14, requiring him, on going out of office, to turn over to his successor all public moneys, etc., was good as to the allegations in these respects, and therefore warranted the overruling of the objection.

4. Same—Office and Officer—Vacancy—Pol. C. c. 5, § 11.

M. having been re-elected county treasurer and declined to qualify, (having also waived his statutory time for that purpose,) *held*, under Pol. C. c. 5, § 11, providing that there shall be a vacancy on the failure of a person elected to qualify, that a vacancy occurred which it was the duty of the board of county commissioners to fill; and, after this was done, under section 14, providing that an officer going out of office shall deliver to his successor all public moneys, etc., it was M.'s duty to at once deliver to his successor such money, etc., without demand.

(Argued May 18, 1887; affirmed May 26; opinion filed February 20, 1888.)

Appeal from district court, Stutsman county; Hon. W. H. FRANCIS, Judge.

The proceedings of the board of county commissioners of Stutsman county show that appellant W. E. Mansfield, on the 7th day of January, 1885, presented for approval his bond for county treasurer for the ensuing term, and that it was rejected. Their proceedings of the 8th show that he was present, and waived his right of ten days for qualifying as treasurer, and the waiver was accepted by the board. The office on that day was declared vacant by them, and George L. Webster was appointed county treasurer until the next general election. This suit was commenced on the 13th day of January, 1885.

Dodge & Camp, for appellants.

The court erred in overruling the defendants' objection to the introduction of any evidence on the ground that the complaint does not state a cause of action.

Separating the facts from the statements of evidence supposed to exist, and conclusions of law, they do not constitute a cause of action. *Clay Co. v. Simonsen*, 1 Dak. 403; *Bell v. Skerer*, 11

N. W. Rep. 861; *Clark v. Railroad Co.*, 28 Minn. 69, 9 N. W. Rep. 75. A county treasurer stands in no fiduciary relation to the county. The money is his own, and, if he has paid the same over as required by law, he has complied with the terms of his bond. *Rock v. Stinger*, 36 Ind. 346; *Shelton v. State*, 21 Amer. Rep. 197; *Perly v. County of Muskegon*, 32 Mich. 132; S. C. 20 Amer. Rep. 637.

This complaint, charging fraud and wrongful acts, must be strictly construed against the pleader.

Plaintiff does not undertake to show from what source the moneys in the hands of the defendant treasurer were derived, or to whom they belong. He simply says that they were received for taxes, and from various other sources. If, then, the defendant treasurer might by law and by virtue of his office have received moneys which the law would allow him to keep at the times mentioned in the complaint, and under the circumstances as shown by the complaint, then the defendant is not a defaulter.

The presumption is that, if the defendant did withhold money, that he acted rightfully, and the burden is upon the plaintiff to allege facts which show to the court that the moneys so withheld were withheld contrary to the provisions of the statute.

If these were moneys belonging to any district, precinct, city, town, or school-district, or to any private citizen, having been received for the redemption of tax certificates, or from various other sources, such moneys might, by the direction or sufferance of the local officers of such precinct, city, town, or school-district, or by the direction or sufferance of such private citizen, remain in the county treasury until such time as it would be required to be paid by them; and if, while allowed so to remain after the time when it should have been claimed by such officer or person as required by law, it should be lost or destroyed without the fault or procurement of the defendant, then he would not be liable. The plaintiff cannot be heard to say that this money belonged exclusively to the county of Stutsman, because it has not alleged it in the complaint. But this court will not and can-

not presume from what source it came or to whom it belonged.

The presumption, then, is that they were funds which did not belong to the county. If this be true, then the office of treasurer was not vacant, George L. Webster was not the legal successor of the defendant, and the defendant had a right to withhold from him any funds in his possession.

It does not appear, from any allegation of fact in the complaint, that the reason why the treasurer had not accounted for and paid over the balance in his hands was not because a state of facts had not yet occurred upon which he was required by law to account for or pay it over. Neither does it appear from any facts pleaded that his successor has been elected, or that the defendant is not still the treasurer of the plaintiff county, and entitled to hold the balance as such. It does not appear that any person authorized to demand and receive the money from him has made any demand, or that any order has been drawn upon him by any person authorized to draw the same which he has refused to pay. *Supervisors v. Kirby*, 25 Wis. 498; *Brown v. Stebbons*, 4 Hill, 154; *Coe v. Rankin*, 5 McLean, 354. See also, *Mutual Loan & Building Ass'n v. Price*, 26 Amer. Rep. 703.

The complaint apparently seeks to allege two causes of action; one a failure to produce moneys, and the other a failure of the treasurer to pay over moneys in his hands to his successor.

A recovery under the first cause of action would entitle the plaintiff to only nominal damages at most. It is the failure to pay over the moneys, and not the failure to produce and show them to the board, which causes an actual loss to the county. *Supervisors v. Kirby*, 25 Wis. 498.

The power of the county board to appoint a treasurer arises when a vacancy occurs, and this may occur by death, resignation, failure to qualify, or removal. The complaint alleges that the vacancy here was caused by removal. The power of a board to remove a treasurer exists only after a suit has been brought on his bond. Pol. C. c. 28, § 96.

And it is clear that the action of the board on the 8th of
v.5DAK.—6

January, 1885, five days before suit had been commenced on the bond, was illegal and void.

Upon this point and the subject of demand the case of *Supervisors v. Semler*, 41 Wis. 374, is instructive.

S. L. Glaspell, for respondent.

In construing the complaint the statute under which the bond was given in legal effect forms part of the contract, and should be considered. *County of Scott v. Ring*, 13 N. W. Rep. 181; *County of Wapello v. Bigham*, 10 Ia. 39; *Clay County v. Simonsen*, 1 Dak. 403; *State v. Nevin*, 7 Pac. Rep. 650.

There are three acts of omission on the part of the treasurer, specifically mentioned in section 95, c. 28, Pol. C., which constitute a breach of the bond, for any one of which this court has said, in *Clay County v. Simonsen*, 1 Dak. 429, suit may be brought. See, also, sections 51, 52, 95, c. 21.

The complaint negatives the conditions of the bond.

This of itself is a sufficient statement of a cause of action. *U. S. v. Spalding*, 2 Mason, 485.

If the allegations are not definite, and fail to apprise the defendant of the precise charge to be brought against him, still the complaint should not be dismissed as not stating a cause of action. Section 129, C. C. Pro., provides a remedy by motion for this.

The allegations of this complaint are similar to those in *Boswick v. Van Voorhis*, 91 N. Y. 353, where the court held it sufficient.

The complaint assigns two specific breaches: Failure to make settlement; failure to pay over money to his successor, with which the treasurer stood charged.

Under section 95, c. 21, Pol. C., the complaint alleges a cause of action.

If plaintiff is entitled to nominal damages, as appellants seem to admit, under this allegation, then the complaint is good.

But the complaint alleges more than a cause of action for nominal damages. It charges that at the attempted settlement

there appeared by the statement of the treasurer a deficit in his accounts of \$9,232.84; that he failed to produce such sum to the board, as required by law; that he then was indebted to the county in that sum; and that he still owes the money to the plaintiff, and refuses to pay it over to the person entitled thereto.

The complaint also charges that he has failed and refused to pay over the funds in his hands to his successor in office after his removal.

This it is provided by section 14, c. 5, Pol. C., he shall do.

PALMER, J. This action was brought under the provisions of the Code of this territory, and by the county of Stutsman, against the defendants, upon an official bond, executed by defendant Mansfield as principal and the other defendants as sureties; said bond bearing date the 2d day of January, A. D. 1883, and conditioned for the faithful and impartial discharge by said Mansfield of the duties of the office of county treasurer, and a true and correct accounting for all moneys, credits, accounts, and property which should come into his hands, and delivery of the same over, according to law, etc.

The complaint alleges, among other things, the due election and qualification of Mansfield as treasurer; that he performed the duties of such office from the 3d day of January, 1883, till the 8th day of January, 1885; setting out the bond in full; the due approval and acceptance of the same by the board of county commissioners; and then charges the breach of its conditions, as follows:

"That all the facts hereinafter set forth occurred after the execution of said bond; that said Mansfield did not faithfully and impartially discharge the duties of his said office, and did not pay over or deliver, according to law, all moneys, credits, accounts, and property that came into his hands; that he did not pay over the balances in his hands to the territorial, county, and school-district officers, upon receiving proper vouchers; that said treasurer, between the 2d day of January, 1883, and the 8th day of January, 1885, received from divers persons, and stood

charged with, divers sums of money as such county treasurer, paid to him for taxes and from various other sources, of which money he was the legal custodian by virtue of his said office, as such county treasurer, in the aggregate sum of \$9,232.84 over and above all moneys which he has legally paid out; that on the 14th day of October, 1884, said board directed said Mansfield to settle with them his accounts as such treasurer, and that he failed to make such settlement, and neglects and refuses so to do; but that pursuant to such request, he did, on the 25th day of October, 1884, present a statement to said board showing a balance in the treasury at said last-mentioned date of \$14,697.07, for which he presented a certified check of the James River National Bank for \$5,464.23, leaving a balance of \$9,232.84, which last-named sum he failed to account for, and failed to produce, and was then, and at all times since that date, indebted to said plaintiff county, and said plaintiff county has demanded of said Mansfield that he pay over said sums to the persons thereunto entitled; and he has wholly failed to pay the same, or any part thereof; that on the 7th day of January, 1885, and at the regular meeting of January, 1885, of said board of commissioners, said Mansfield made a statement in writing to said board, showing, among other things, a balance in his hands of \$9,232.84 which he did not produce; whereupon the said board, by resolution, instructed the county clerk to cause suit to be instituted against said Mansfield and his sureties, and thereafter, on the 8th day of January, 1885, the said board did remove said Mansfield from the office of treasurer of said county, and declare said office vacant, and duly appointed one George L. Webster to fill the vacancy thereby created."

The defendants, answering, admit the election and qualification of Mansfield, treasurer, and the due execution of the bond as set forth in the complaint, and put in issue all other allegations of the plaintiff's complaint.

The cause came on for trial by jury in the district court, and at the proper time the defendant "objected to the introduction of any testimony in the case on the ground that the complaint

does not contain facts sufficient to constitute a cause of action."

This objection, which is presented by the first assignment of error, is in the nature of a demurrer *ore tenus* to the complaint, and the legal effect of such an objection is here presented to this court for the first time, so far as I am informed.

While it seems to be settled by adjudicated cases, in the Code states, that upon such an objection the court must determine from the facts alleged what the cause of action attempted to be stated is, and whether it is sufficiently stated, still the application of the legal rules of construction must not be overlooked. In the construction of a pleading, the maxim of the common law is that everything shall be taken most strongly against the party pleading. 1 Chit. Pl. 237. Section 128, Code Civil Proc., however, provides: "In the construction of a pleading, for the purpose of determining its effect, its allegations should be liberally construed with a view of substantial justice between the parties."

However much of misunderstanding or misconception the above provision may have occasioned in the minds of both the bench and bar, when attempting to apply it in testing the sufficiency of a pleading, we may not now stop to discuss. It is sufficient to know that in all the Code states, having provisions like section 128 of our Code of Civil Procedure, if the courts have at times lost their bearings in construing it, they have at last "returned into line," and, as Mr. Pomeroy, in his work on Remedies, in discussing this question, says: "But the conflict (which at first appears) was in by far the greater part of the states confined to the earlier periods of the reform, and has virtually disappeared. There is a substantial agreement among the courts in respect to the general principles which they have finally adopted. Whatever difference now exists arises in the process of applying these fundamental doctrines to particular cases. The confusion which actually prevails to a very great extent in several of the states results, not from any uncertainty, either in the general principles or in the more subordinate rules, but from an entire ignorance or disregard of them by plead-

ers, and from a neglect to enforce them by the judges." Section 513.

And again, (section 517,) the writer continues: "The fundamental and most important principle of the reform pleading, the one from which all the others are deduced as necessary corollaries, is the following: The material facts which constitute the grounds of relief should be averred as they actually existed or took place, and not the legal effect or aspect of those facts, and not the mere evidence or probative matter by which their existence is established."

Such is clearly the rule to be applied in determining the sufficiency of a pleading when presented by a statutory demurrer for that purpose. A legal conclusion is of no effect in a pleading, and should upon demurrer be disregarded. See *Wallingford v. Society*, 34 Moak, 65; *Pratt v. Lincoln Co.*, 61 Wis. 62, 20 N. W. Rep. 726; *Quinney v. Stockbridge*, 33 Wis. 505; *Sheridan v. Jackson*, 72 N. Y. 170; *Alabama v. Burr*, 115 U. S. 413, 6 Sup. Ct. Rep. 81; *Pier v. Heinrichoffen*, 52 Mo. 333; *Emery v. Pease*, 20 N. Y. 62.

This rule of construction would no doubt have been applied by the district court, and this court as well, if the question had been presented by demurrer before answer. What conclusion would have been reached in such a case is unnecessary for us to determine here. No demurrer was presented before answer in this case, but a demurrer *ore tenus* was interposed when the evidence was presented upon the trial. As has been suggested when so presented, the court must pass upon the sufficiency of the allegation thus put in issue. But in construing or interpreting the language of a pleading, when presented as in the case at bar, the rule seems to be settled, that "a greater latitude of presumption may be indulged to sustain a complaint where the objection that it does not state a cause of action is taken for the first time at the trial, and after an issue of fact has been taken upon it by the answer, than where the same objection is taken by demurrer." *Hazleton v. Bank*, 32 Wis. 34; *Teetshorn v. Hull*,

30 Wis. 162; *White v. Spencer*, 14 N. Y. 247; *Cady v. Allen*, 22 Barb. 388; *St. John v. Northrup*, 23 Barb. 25.

This is a wholesome rule in the practice.

If the pleading is indefinite or uncertain, section 129, Code Civil Proc., provides a remedy by authorizing the court to require the pleading to be made definite and certain by amendment. And for courts to be required to pause in the midst of a trial, and examine, interpret, and construe the allegations of a pleading, when the conclusion reached would very likely involve litigants in great and unnecessary expense (by way of preparation for trial) and perhaps serious delay in the adjudication of the rights of parties, when the same questions can much more satisfactorily to both courts and parties be determined before issue is joined upon the facts stated in the case, is a practice not to be commended by the court.

Applying, then, the rule of construction applicable, when presented by a demurrer *ore tenus*, we conclude the allegations of the complaint state facts sufficient to constitute cause of action. This court has said, in *Clay Co. v. Simonsen*, 1 Dak. 429: "There are three acts of omission on the part of the treasurer, specifically mentioned in the statute, which constitute a breach of his official bond; for any one of which, upon its occurrence, suit may be brought. These are—*First*, if he shall fail to make a return; *second*, fail to make settlement; or, *third*, fail to pay over all money with which he may stand charged at the time and in the manner prescribed by law."

Defendant Mansfield is expressly charged in the complaint with having failed and refused to settle with the board of county commissioners his accounts as treasurer, at the times required by law; and, *secondly*, with neglecting and refusing to pay over to his successor in office the sums appearing from the records as a balance belonging to the county, and which is the amount in controversy in this action.

Section 95 of the Political Code provides, among other things, that at the regular meeting of the board of county commissioners in January and July of each year, and at such other times

as they may direct, the county treasurer shall settle with them his accounts as treasurer, and for that purpose shall exhibit to them all his books, accounts, moneys, etc., * * * and if found correct, the accounts shall be so certified; if not, he shall be liable on his bond.

The meaning of such language is surrounded by no cloud of uncertainty. Prompt and affirmative action on the part of county treasurers is demanded by this provision at these biennial sessions. It is incumbent upon them to proceed in the plain performance of their duties, make their exhibits of books, accounts, and moneys, and make their settlement; and in case of failure of such action it becomes the duty of the board of county commissioners, for the proper protection of the rights of the public, to institute proceedings upon the official bond, as was done in this case.

Again, section 14, c. 5, Pol. Code, provides: "Every officer elected or appointed under the laws of the territory, on going out of office, at the expiration of his term thereof, shall deliver to his successor in office all the public moneys, books, records, accounts, papers, and documents in his possession belonging to or appertaining to such office."

At the allegations of the complaint, drawn evidently to meet this provision in the Code, is the chief attack in support of the demurrer *ore tenus*.

It is unnecessary to inquire what would have been the effect of a demurrer before answer to that portion of the complaint, if it had been thus attacked, as a separate cause of action; but, as we have seen, some of the allegations were well pleaded, and for that reason the court below was correct in overruling the objection to the evidence.

It would seem the board of county commissioners, instead of treating Mansfield's failure to qualify as creating a vacancy, which it was their duty to fill, were unnecessarily attempting to follow section 52, c. 21, Pol. Code, relating to delinquent treasurers,—a proceeding complete in itself, but not necessarily invoked to meet the case of a treasurer going out of office, and

failing to account. The action of the board in this regard was doubtless confusing, and it is not surprising that confusion should follow the pleader in attempting to state facts sufficient to constitute a cause of action, when the record of the meeting of January 8, 1885, shows a vacancy in the office of treasurer, at a time previous to the action of the board removing Mansfield, who was already out, by his own voluntary act. Under section 11, c. 5, Pol. Code, there was clearly a vacancy in the office when Mansfield declined to qualify, and waived the statutory 10 days for that purpose, and that was made a matter of record. Mansfield's duty was then plain and unmistakably indicated by the following fourteenth section, which required him, as a retiring officer, to deliver to his successor all public moneys, etc.

It is strenuously insisted, however, that Mansfield could not be required to turn the property of the office over to Webster, his successor, because Webster had not been regularly and legally appointed, and was not, therefore, legally his successor in office; and *Supervisors of Washington Co. v. Semler*, 41 Wis. 374, is relied upon as authority for such position. This claim is made, presumably, upon the theory that the acts of the commissioners in removing Mansfield, and ordering suit to be instituted, were irregular; but, as we have indicated, there being clearly a vacancy in the office before any such action by the board was taken, their proceedings in this respect were not very material. It may be observed, however, in passing, that the Wisconsin case was predicated upon a removal statute, in which case a demand by the successor was required by law before action could be instituted. See section 181, Taylor's St. Wis.

Under our Code no demand is required either in case of removal, expiration of term of office, or a vacancy otherwise created.

The errors assigned as to the rulings of the trial court in admitting the testimony tending to show demand were therefore without prejudice, if, in fact, error was committed, which we do not decide.

Concluding, then, that a vacancy existed on the 8th day of January, 1885, at the time Mansfield declined to qualify as required by law, waiving his statutory time for that purpose, it was then, at that time, clearly the duty of the board to fill the vacancy by appointment, which the record shows they did. Nothing was then left for Mansfield to do but to turn over at once "all public moneys, books, records, accounts, papers, and documents in his possession belonging or appertaining to such office." Section 14, Pol. Code, c. 5.

And upon his failure to do this a cause of action existed upon his official bond. In this view of the case no question of estoppel was involved, and none will be considered. Affirmed.

All the justices concurring except THOMAS, J., who did not sit in the case.

WHITING, Respondent, v. CHICAGO, M. & ST. P. RY. CO., Appellant.

1. Railroads—Gross Negligence—Evidence—Combustible Materials Near Track.

On an issue of gross negligence, in an action for the loss by fire of certain goods in the warehouse of a railroad company, where it appeared the fire was caused by some burning packing that had been taken out of a "hot box" by train-men, and left a foot or two from a raised platform that extended to the warehouse, and it also appeared at the time that there was a strong wind blowing in the direction of the house from where the packing was, *held* permissible to show that there were combustible materials around and under the platform near where the packing was left.

2. Same—Case for Jury.

In an action against a railroad company for the value of certain goods burnt in its warehouse through alleged gross negligence, it appeared that train-men, at night, had taken burning packing out of a "hot box," and left it within two or three feet of a raised platform that extended to the warehouse; that under the platform, near the packing, were weeds, paper, and other combustible materials; that at the time a strong wind was blowing in the direction of the warehouse from where it had

been placed, and in about thirty minutes after a fire was discovered in that part of the platform where it had been left,—*held* a case for the jury.

(Argued May 16, 1887; reversed May 26; opinion filed February 20, 1888.)

Appeal from the district court of Lincoln county; Hon. C. S. PALMER, Judge.

F. R. Aikens, for respondent.

The jury are constituted the sole judges of the credibility of the witnesses and the value, force, and effect of their testimony. *Hipsley v. Kansas City R. Co.*, 4 West. Rep. 47; *Sioux City & Pacific R. Co. v. Stout*, 17 Wall. 657-665.

What constitutes negligence in a given exigency is generally a question for the jury. Where material facts are disputed, or inferences of fact are to be drawn, the case should be submitted to the jury. It is only when the precise measure of duty is determinate—the same under all circumstances—that the court can undertake to determine what is negligence. *Pittsburgh, O. & E. L. P. R. Co. v. Kane*, 6 Atl. Rep. 845, 5 Cent. Rep. 912; *Richardson v. Kier*, 34 Cal. 63.

What may be gross negligence in one case may not be so, in light of the particular facts, of another; and ordinary care in one state of the case may be very gross negligence in another and different case. *Northern Cent. R. R. Co. v. State*, 29 Md. 438.

Counsel for the appellant admits that the testimony of one witness tends to prove negligence. This is enough. If there was even the slightest proof of negligence, either positive or inferential, then it was a question of fact for the jury, and the court below would have erred in taking the case from the jury. *Sioux City & Pacific R. R. Co. v. Stout*, *supra*; *Caledonia Gold Mining Co. v. Noonan*, 3 Dak. 208, 14 N. W. Rep. 426; *Star Printing Co. v. Matthiesen*, Id. 237-239, 14 N. W. Rep. 107.

Had there been no wind, had the box been unpacked and the waste left in a less dangerous place, or had the wind been blow-

ing in a direction which would have taken the waste away from the building, the acts might have been devoid of carelessness; but it was proper for the jury to take every circumstance surrounding the case into consideration, and determine therefrom whether there was gross negligence. *Webb v. R. W. & O. R. R. Co.*, 49 N. Y. 429; *Cooley*, Torts, 632.

H. H. Field and *A. H. Barton*, for appellant.

The defendant contends that the evidence is entirely insufficient to establish gross negligence on the part of the defendant.

The law is well settled that, where the goods or baggage of a person are left in the custody of a common carrier simply for the accommodation of the owner, and without any agreement for compensation, the common carrier is bound only to exercise slight care, and is responsible only for gross negligence. *Minor v. C. & N. W. Ry. Co.*, 19 Wis. 40; *Van Gilder v. C. & N. W. Ry. Co.*, 44 Ia. 548; *Green v. Birchard*, 27 Ind. 483; *Brown v. Grand Trunk Ry.*, 54 N. H. 535; *Knowles v. Atlantic, etc. R. Co.*, 38 Me. 55; *O'Brien v. Vaill*, 1 South. Rep. 137.

Gross negligence on the part of a gratuitous bailee has generally been held, in legal effect, to be the same thing as fraud. *Jones*, Bailments, 46, 47; *Foster v. Essex Bank*, 17 Mass. 479; *National Bank v. Graham*, 100 U. S. 699, 702; *Bank v. Bank*, 70 N. Y. 278; *Tracy v. Wood*, 8 Mason, 132.

The rule laid down by Sir William Jones in his work on Bailments, 46, 47, 120-123, is that a gratuitous bailee is only liable for the exercise of slight care, and that, if he keeps the property bailed with the same care that he keeps his own, that is the measure of his responsibility; and he further says that, if he can show that his own property has been lost or destroyed in the same catastrophe in which his bailor's is lost, then he is presumptively discharged from all liability. *Story*, Bailments, 62-64, 183. See, also, 2 Kent, Com. 562; *Schouler*, Bailments, 42, 43, 45; *Edwards*, Bailments, 47; *Foster v. Essex Bank*, 17 Mass. 479, 500; *Coggs v. Bernard*, 2 L.

Raym. 915; 1 Smith, Lead. Cas. 284; *Spooner v. Mattoon*, 40 Vt. 300.

"Slight care or diligence is such as persons of ordinary prudence usually exercise about their own affairs of slight importance." Section 2100, Civil Code; *Whitney v. Bank*, 55 Vt. 155; *Clark v. Eastern R. Co.*, 139 Mass. 423; S. C. 1 N. E. Rep. 128; 21 Amer. & E. R. Cas. 307; *Fleming v. Northampton Nat. Bank*, 62 How. Pr. 177.

The fact that there was a slight accumulation of *debris* under the platform is of no consequence. The platform was a raised one, which is customary, and the evidence shows that there was but very little accumulation, and no more than is ordinarily found under buildings on the prairie, which are raised above the ground. The testimony shows that the waste was left upon the side of the track, some little distance away from the platform, and there was no proof that the employes of the defendant knew of the accumulation under the platform. Applying the rule that, where the verdict is clearly against the evidence and the law, it should be set aside, the motion for a new trial in this case should have been granted, and, failing in that, the judgment should be reversed. *Randall v. B. & O. R. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Fleming v. Bank*, 62 How. Pr. 177; *Jourdan v. Reed*, 1 Iowa, 135.

PALMER, J. This action was brought by plaintiff to recover the value of certain household goods, shipped from Chicago, via the defendant's railroad line, to Canton, Dak., in August, 1885. The goods were received by defendant's agent at Canton, and by him placed in defendant's depot or warehouse, where, on the 19th of August of the same year, they were destroyed by fire, the same fire consuming the defendant's depot and warehouse, with all its contents.

The action is brought against the defendant as warehouseman.

No question was made as to the value of the property. The only evidence in the case tending to show the character of the

bailment at the time the goods were destroyed, (whether as a bailment for hire, or gratuitous,) was from the plaintiff himself, who testified, in substance, as follows: "I know nothing of the origin of the fire. Cannot tell when the goods arrived at the depot. Think I went to depot on the 14th of August; the goods were there at that time. I saw Goetz, the station agent, and told him that my house which I had rented was not yet vacated, and I came to see if I could make some arrangement about storing the goods. I did not know just how long I would want him to take care of them for me, but perhaps a number of days. He said that they were quite busy now. He did not know just how it would be about it, but said he would take care of them, and that he would notify me in case he had to have the room. I think he said the freight was nearly twelve dollars; he could not find the freight bill then. I have not paid the freight yet. I told him it was of no consequence at all. I was ready to pay it, so I did not learn the exact amount. I saw the agent the next day; also the goods. I saw that they had not been put in very good shape. I asked him about it. He said that they got out some goods back of them that day, and that he would store them up in good shape for me, and in case he had to have the room he would notify me. I told the agent it would be an accommodation to me for him to store them. I knew the accommodation would cost me something; I supposed it would. There was nothing said as to any compensation between me and the agent,—no amount agreed upon. I made no promise to pay him anything. I did not agree to pay him anything. He did not tell me he should charge me anything. He told me at the time they were short of room at the depot. It was quite an accommodation. I told him I would have to pay rent somewhere else. I remember he agreed to keep them. There was nothing said as to pay. I did not ask the agent what the amount would be. I expected to pay the freight when I got the goods. I never paid any charge for storage to the agent. He never presented any bill. Nothing was said about it at all. I considered the storage of them there an accommodation to me, as I learned room

was very scarce. I knew I had to rent a room somewhere for storage. It would be an accommodation, and would save me drayage."

Did this constitute a gratuitous bailment or deposit, *quære?*

The trial court held it to be a gratuitous deposit, and that the defendant was only bound to take "slight care" of the goods, and was only responsible for "gross negligence."

The evidence tended to show that the fire occurred about midnight on the 19th day of August; that at the time a freight train from the east arrived at the station, stopped about 20 or 30 minutes, and moved on westward; that said freight train, when it arrived at the station, had what is known as a "hot box;" that the train-men, while stopping at the station, "unpacked and repacked the hot box;" that the track upon which the train was standing at the time was directly south of the depot; that the burning waste from the hot box was removed, and piled upon the ground between the end of the ties towards the depot; and, as the conductor in charge of the train testified, "When I packed the box, I stood down between the box and the platform. There was plenty of room—two and one-half or three feet—between the box and the platform."

A portion of this waste thus removed was placed back in the box, and the rest was left on the ground, where it was taken out, and confessedly within 30 or 36 inches of the platform, which extended up to and connected with the depot and warehouse.

The evidence further disclosed the fact that the platform, at the point where the waste was deposited, was elevated above the ground, and that old waste, paper, weeds, and rubbish generally, had been carried under it by the winds; that at the time the fire caught, a strong wind was blowing from the south, so that fire and burning shingles were carried north from the depot a distance of 60 or 80 rods; that the portion of waste left on the ground from the hot box was smoking when the train left the station; that the fire was first discovered in the platform at the point where the burning waste was deposited, and within 20 or 30 minutes thereafter.

Excepting the testimony relating to the character of the material called "waste," and its capacity to retain fire, and be fanned to a blaze by the wind, the above is the substance of the material testimony adduced at the trial.

Practically only two questions are presented by the assignments of error.

The first is to the ruling of the court in admitting the testimony of witnesses as to the condition of the ground around and under the platform at the point where the waste was deposited, and the fire originated.

The second relates to the refusal of the trial court to direct a verdict for the defendants, because of the insufficiency of the evidence to support a verdict of gross negligence against the defendant company.

Under the *first* assignment is presented the admissibility of the evidence offered to show that waste, weeds, old papers, and other highly inflammable material, were permitted by defendant's agents to accumulate around and under the platform at the point near where the burning waste was left on the ground.

In the absence of any other theory as to the origin of the fire, and with the undisputed evidence that a strong wind was blowing exactly in the direction of these combustibles, if they were there, it is very clear that this was competent evidence upon the issue of gross carelessness.

Second. Was the evidence sufficient to support the verdict? The trial court told the jury "that the railroad company can only be held liable, in a case like this, when goods are lost or destroyed through their gross negligence. Under the law of this territory there are three degrees of negligence mentioned, viz., slight, ordinary, and gross. Slight negligence consists in the want of great care and diligence; ordinary negligence is the want of ordinary care and diligence; and gross negligence is the want of slight care and diligence. It is only under and by virtue of the last provision which I have read in your hearing that the defendant in this action can be held liable. Unless you are satisfied from the evidence that the railroad company, in the

care and custody of these goods, were guilty of gross negligence; or, to state it conversely, if you find from the evidence that they did not exercise slight diligence and care, then they may be held liable," etc. From the evidence presented by the record the defendants could certainly not complain of the rule of law thus laid down; and from all the evidence in the case we are of the opinion the trial court was justified in submitting the case to the jury, and we are not prepared to say from all the evidence that the jury were not warranted in finding that the acts of the defendant's agents and employes were grossly negligent. The judgment must be affirmed.

All the justices concur.

CADY, Respondent, v. CHICAGO, M. & ST. P. R. Co., Appellant.

1. Appeal—Aggregate Verdict—Review of Part.

Where there is a general verdict for the aggregate loss sustained by two negligent injuries, and the only error relied on is the charge of the court as to one, its correctness will not be determined, for the case could not be reversed, there being no error insisted upon as to the other injury sustained.

2. Same—Modification of Judgment—C. C. Pro. § 23—Excess, How to Appear.

Under C. C. Pro. § 23, empowering the court to modify the judgment appealed from, the amount erroneously awarded and embraced in the judgment must clearly appear from the record. Where the verdict was in the aggregate for two losses by negligence on different dates, and there being no way of determining the amount of the one respecting which only error was claimed, the judgment cannot be modified.

(Argued May 20, 1887; affirmed May 26; opinion filed February 20, 1888.)

Appeal from the district court of Moody county; Hon. C. S. PALMER, Judge.

R. Brennan, for appellant.

Cady testifies that on April 30th he had killed,—one cow, worth \$100; one cow, worth \$25; one cow, worth \$40, injured, which
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died three days after; one heifer, damaged \$10 to \$12; and on May 7th, one cow killed, worth \$55.

He presumes these to have been killed by the company; did not see the killing; and his testimony relative to it is hearsay, incompetent, and would not warrant a verdict.

Link, a witness for plaintiff, says he saw the train, on April 30th, strike three head.

Town, engineer of freight train: "I saw the engine strike two. I think we struck three, for three remained."

Tierney says two were struck; and all the evidence relating to the cow injured on the 7th is from the conductor, engineer, fireman, and Mr. Tennant, who all say that that cow on that day had a foot or leg broken only.

Now, this defendant in this verdict is charged with the killing of four head of cattle, for any other supposition would be simply a deduction not warranted by the testimony.

There is no dispute as to the value of these cows, or as to the injury to the heifer; and the total damage by the killing, as sworn to by the plaintiff, amounts to \$235 or \$237.

The jury have found for the plaintiff in the sum of \$223. This of course presumes the idea that they have excluded from their consideration anything other than the injury to the heifer, the damage to which was estimated at ten or twelve dollars.

It then appears that the jury must have found that the defendant killed four head of stock, the value of which, according to plaintiff's testimony, is \$225.

There is no testimony before the court or jury that five head of cattle were injured or killed; for, remember, one fully recovered.

We insist this verdict is not justified by the evidence.

Rice Bros., for respondents.

The only point made is that the verdict is excessive in that there was no proof of the killing of more than three animals.

The verdict is fully sustained by the evidence. It is found the whole value of the stock killed was \$215, the damage to the

one injured that did not die was \$10, or \$225 in all, or \$2 more than the verdict of the jury. The evidence of the killing of the stock is that of plaintiff, and also Link, who testifies that he saw three head of cattle struck by the engine on April 30th. Defendant's own witness, Mr. Tennant, testifies that he was on the passenger train that killed the last cow. There being no dispute as to the killing of the stock, or its value, there is nothing in the question of excessive damage.

PALMER, J. This was an action brought against the defendant corporation, to recover damages for the killing of certain cattle upon the defendant's track, and near the adjoining land of the plaintiff.

The defendants admitted the killing of a portion of the stock, but claimed to be relieved from all liability therefor, because the stock was trespassing upon the defendant's right of way at the time of the accident; and all diligence was used by the agents of the defendant in the management of the train to avoid the injury; and that the plaintiff so far contributed to the injury by allowing his stock to run at large, and upon the defendant's right of way, that no recovery could be had in the case.

Trial by jury. Verdict and judgment for the plaintiff.

It appears from the record in the case that a portion of the stock in controversy was killed on the 29th day of April, 1885; and one cow, for which damage is claimed in the action, was killed on the 9th day of May, 1885.

Various assignments of error are presented, some of which relate to the improper admission of evidence, and others to errors claimed in the charge of the court.

Upon the argument of the case in this court, the only error relied upon by counsel relates to the charge of the court upon the subject of the killing of the single cow on the 9th of May.

Without attempting to consider or decide the correctness of the legal proposition presented by the charge of the trial court upon this branch of the case, it is sufficient to say that, the verdict of the jury being general, for an aggregate sum for the plain-

tiff for all the injury complained of, and no error being insisted upon relating to the injury occurring on the 29th day of April, the case cannot be reversed; and counsel for appellant only ask that it be modified by reducing the amount of the judgment rendered by deducting the value of the property injured on the 9th of May.

The alleged errors in the main case, viz., those relating to the injury on the 29th of April, having been abandoned, the case cannot be reversed, and the question is, can it be modified?

Section 23, Code Civil Proc., provides among other things, that, "the supreme court may reverse, affirm, or modify the judgment or order appealed from in whole or in part," etc.

But to warrant this court in modifying the judgment by reducing it, the amount erroneously awarded and embraced in the judgment must clearly appear upon the record.

The jury not having found the value of the cow killed on the 9th of May, but returning a verdict in the aggregate, as damages sustained by plaintiff, and there being no way of determining the value of said cow, or whether her value was included in the sum returned by the jury as damages to the plaintiff, the judgment cannot be modified, but must be in all things affirmed.

All the justices concur. THOMAS, J., not sitting.

SARLES *et al.*, Appellants, *v.* SHARLOW *et al.*, Respondents.

1. Statute of Frauds—C. C. § 920, subd. 1.—Performance within Year.

An oral agreement made June 5, 1883, whereby D. contracted to furnish S. lumber and other materials as he might need them to construct four buildings, three to be erected during the season of 1883, and the fourth during the season of 1884, was one, from its terms, that was capable or possible of being performed within a year, and not, therefore, invalid under section 920, subd. 1, C. C., requiring contracts not to be performed within a year to be in writing, or that there should be some note or memorandum thereof.

2. Same—Construction—Subdivision 1, § 920, C. C.

Subdivision 1, § 920, C. C., making an agreement that by its terms is not to be performed within a year invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party to be charged, is substantially a re-enactment of the statute of Car. II. on the same subject, and under it, to hold an agreement void, it must be incapable of performance within a year.

3. Rules as to Construction and Enforcement of Contracts.

It is the policy of the law to sustain and enforce contracts when it can be done without violence to the language used, or the rules of construction; and when the language is equally susceptible of two or more constructions, that will be adopted which will sustain the contract, rather than the one that will destroy it.

4. Mechanics' Liens—C. C. Pro. § 662—Filing and Correction.

Under section 662, C. C. Pro., permitting a mechanic's lien to be filed with the clerk of the district court within 90 days after furnishing the materials, D. in due time filed his lien, but from an error in the description of the land it created no charge. Seven days after, but within the ninety days, the clerk, at the instance of D., corrected the lien by inserting the true description, swore D. to it, and indorsed thereon what he had done in the premises. *Held* a valid lien from and after the correction, though the action of the clerk was "somewhat irregular."

(Argued February 9, 1887; reversed February 16; opinion filed February 21, 1888.)

Appeal from the district court of Stutsman county; Hon. W. H. FRANCIS, Judge.

A. D. Thomas and John S. Watson; for appellants.

The mechanic's lien was made and filed by the plaintiffs at their own expense, and for their sole use and benefit. After filing, it still remained their property, and they had a perfect right, with consent of the clerk, to withdraw it from the files, and to destroy it, or correct an error in it, so long as such correction was made fairly, openly, and in a manner that could not deceive the public.

The corrected instrument, resworn to on the 7th November, 1884, showed conspicuously that it was not perfected until that date. And that was within 90 days after all of said material

had been furnished. See *Challoner v. Howard*, 41 Wis. 355, 14 Kan. 227; Phillips, *Mechanics' Liens*, 599.

The court erred in holding that the contract was invalid because within the statute of frauds, that statute having no application to executed contracts.

It was for the sale and delivery of lumber and building material.

The property was sold and delivered, and the primary object of this action is to recover for goods sold and delivered. The secondary object is to assure such recovery by the enforcement of the lien given by statute.

The court decides that the plaintiff is entitled to recover the amount claimed, yet denied the lien on the ground that the contract was void. That is a palpable inconsistency which must have resulted from an inadvertent application to this case of the law governing executory contracts within the statute of frauds.

Dodge & Camp, for respondents.

The point made by appellants, that after filing the lien it still remained their property, and they had perfect right, with consent of the clerk, to withdraw it from the files, and to destroy it, or to correct an error in it, etc., we deny. The act of the clerk permitting the description of the premises to be changed was unauthorized, and against positive law, and a court should construe the unlawful act as not having been done. Section 140, P. C.

A mechanic's lien is not only a record and a paper, but it is a proceeding, as defined in practice, which only a court, if any one, can correct. 13 How. (N. Y.) 398-401; Wait, Code, 19.

No process, pleading, or record can be amended by the clerk or other officer of any court, or by any other person, without the order of such court or some other court of jurisdiction. 4 Wait, Practice, 644; *McComber v. Mayor*, 17 Abb. 35, 5 Wis. 386; *Collins v. Collins*, 24 Amer. Rep. 632.

The lien when filed is the commencement of a proceeding to subject the property to the contractor's claim, without the filing

of which he would simply have an action at law against the owner. *Valentine v. Ransom*, 10 N. W. Rep. 338; *Rugg v. Hoover*, Id. 473; *Finane v. Las Vegas Hotel Co.*, 5 Pac. Rep. 725; *Kruse v. Thompson*, 4 N. W. Rep. 814; *Jones v. Magee Lumber Co.*, 19 N. W. Rep. 678; *Hutton v. Maines*, 28 N. W. Rep. 9; *Malter v. Falcon Mining Co.*, 2 Pac. Rep. 50; *White Lake Lumber Co. v. Stone*, 27 N. W. Rep. 395; *Sisson v. Holcomb*, 26 N. W. Rep. 155.

A party filing a paper in the clerk's office has no further control over it except to file another to satisfy, modify, or nullify the original; and such paper cannot be changed except by order of the court, and not then if the change would affect the rights of third parties. 11 Wis. 314; 15 Wis. 68.

The contract was void because by its terms not to be performed within one year. It was performed in accordance with its terms, and not within one year. Such a contract, when performed by one of the parties, will not support an action; that is, the action must be on a *quantum meruit*, and not on the contract. 3 Parsons, Cont. 39; Browne, St. Frauds, (4th Ed.) §§ 110, 122a, 131, 289; *Moody v. Smith*, 70 N. Y. 598; *Galvin v. Prentice*, 6 Amer. Rep. 58; *Bernier v. Cabot Man. Co.*, 36 Amer. Rep. 343; *Towsley v. Moore*, 27 Amer. Rep. 434.

The lien is simply security for the contract. It cannot subsist without a contract; and by contract is meant a valid, not a void, contract. Kneeland, Mech. Liens, 56; *Rogers v. Phillips*, 47 Amer. Dec. 727; *Chapin v. Paper-Works*, 79 Amer. Dec. 263; *Monroe v. West*, Id. 524; *Hunter v. Blanchard*, 68 Amer. Dec. 547; *Bottomly v. Grace Ch.*, 2 Cal. 90.

THOMAS, J. This is an action for the enforcement of a mechanic's lien for lumber and material furnished by appellants to the respondent James L. Sharlow, for the erection of certain buildings on said Sharlow's land.

The complaint avers, in substance, that on the 18th day of August, 1883, the plaintiffs entered into a contract with the defendant Sharlow, whereby they agreed to furnish to him lumber

and material for use in the construction of certain buildings to be situate on the land of said Sharlow. Between the 18th day of August, 1883, and the 10th day of September 1884, pursuant to said agreement, plaintiffs furnished lumber and material for the erection of said buildings, of the reasonable value of \$2,795.79.

The joint answer of defendants Sharlow, D. C. Buck, and Daniel H. Buck alleges, on the part of Sharlow, what amounts to a general denial, and an accord and satisfaction. On the part of the defendant Buck it is alleged that, on or about the 1st day of November, 1884, defendant James L. Sharlow sold and conveyed the premises described in the complaint to defendant D. C. Buck, and that he, before the institution of this suit, sold and conveyed the same to his co-defendant Daniel H. Buck, who is now the owner thereof in fee.

In the answer of the other defendants the only material averment is that defendant Walter J. Hughes was given a mortgage on said land of date the 11th of December, 1883, which was duly recorded, and has since been foreclosed, and the land purchased by said Hughes.

The trial in the district court resulted in a decree denying plaintiffs' lien, and plaintiffs prosecute this appeal seeking to reverse said judgment, and assign numerous errors in support thereof. We, however, deem it worth our while to consider but three of these alleged errors, as upon them depends the proper settlement of all the issues in the case. They are substantially as follows:

1. The court erred in deciding the agreement between the plaintiffs and the defendant Sharlow void by reason of the statute of frauds.

2. The court erred in holding plaintiffs' lien invalid.

3. The court erred in refusing to grant a decree in favor of plaintiffs, on the record and findings of the court, as demanded in the complaint.

It will be observed that the assignments of error present for our consideration questions of law; but, in order to properly

determine them, it is necessary to examine the facts upon which the court below based its judgment. It appears from the findings of the court, aided by a special verdict of a jury, that the facts are about as follows. The contract was made on or about the 5th day of June, 1883, by the terms of which the lumber and material were to be furnished by plaintiffs as they might be needed by defendant Sharlow in the construction of the buildings aforesaid. The dwelling-house, barn, and small granary were to be built during the season of 1883; the large granary during the season of 1884. The agreement was oral, and no memorandum thereof was made or signed by the parties. It further appears that the house, barn, and small granary were built between the 18th day of August, 1883, and the 5th day of June, 1884; the large granary was erected and completed between the 16th day of August and the 15th day of September, 1884. The plaintiffs furnished for use in the construction of these buildings lumber and other material of the value of \$2,600.17, and there was no accord and satisfaction. The last item of lumber and material was furnished on the 10th day of September, 1884.

It also appears from the findings of the district court that on the 30th day of October, 1884, Lee B. Durstine, one of the plaintiffs, executed and filed in the office of the clerk of the district court of Stutsman county a written statement, verified by his affidavit, containing what was thought to be a description of the property sought to be charged, situated on the lands of the defendant Sharlow, with an itemized account of lumber, etc., attached. Thereafter, on the 7th day of November, 1884, the clerk, at the instance of said Durstine, altered the description of the lands, as contained in said lien, so as to make it conform to the true description of said land. As thus corrected, it was sworn to by said Durstine, and was suffered to remain of record, with the written indorsement thereon by the clerk of what had been done in the premises.

It was upon this state of facts that the district court rendered its decree giving judgment for the amount of plaintiffs'

claim, but denying the enforcement of the plaintiffs' lien. If the court below were correct in holding the agreement between plaintiffs and Sharlow void because within the statute of frauds, it follows, as a matter of course, that the lien was also invalid, from the fact that, under the law of this territory, such a lien must be based on a contract. Code Civil Proc. § 655.

But is the agreement as found by the court below within the statute of frauds? It is for the sale of personal property; and, in order to be within the purview of said statute, it must be "an agreement that by its terms is not to be performed within a year from the making thereof." Civil Code, subsec. 1, § 920. This, it will be seen, is substantially an enactment by the legislature of the territory of the somewhat ancient statute (Car. II.) on the same subject. It has been uniformly held by courts of this country and England that, in order to render an agreement void by reason of this statute, it must be from its terms incapable of performance within a year from the making thereof. *Houghton v. Houghton*, 77 Amer. Dec. 71; *Blanding v. Sargent*, 66 Amer. Dec. 720, note, 722; *Peters v. Westborough*, 31 Amer. Dec. 142; *Gadsden v. Lance*, 37 Amer. Dec. 548; *Lyon v. King*, 45 Amer. Dec. 219; *Esty v. Aldrich*, 46 N. H. 129; *Worthy v. Jones*, 11 Gray, 170.

It is true, as it seems to us, some of these cases run the knife of judicial interpretation dangerously near the vitals of this clause of the statute; but, as they seem to be in harmony with the general trend of authorities on the subject, we may regard them as announcing the settled construction to be given to the statute. We may also not unreasonably assume that the legislature of this territory, by its enactment of said statute, intended to adopt the construction thus given it by the courts.

Let us see, then, whether the agreement, by its terms, was capable or possible of performance within a year from the making thereof. The lumber and materials were to be furnished as they were needed by Sharlow for the erection of the buildings, three of which, by the terms of the agreement, were to be and were actually built during the season of the year 1883; the

other was to be built during the season of the year 1884, and was erected and completed between the 16th day of August and the 15th day of September of that year.

It will be observed that the agreement was not performed within a year from its making as regards the large granary; but was there anything in the terms thereof which prevented it from thus being performed? It seems to us that, under the terms of this agreement, Sharlow had the right, if he so desired, to have completed these buildings, and demanded the delivery of the lumber for that purpose, at a time prior to the 5th day of June, 1884. If so, it was certainly possible to have performed the contract within a year from its making. That Sharlow had this right or privilege, under the terms of said agreement, is very clear, unless the word "season," as used in the agreement, be construed as referring alone to a period of the year subsequent to the 5th day of June. Such a construction would be entirely arbitrary, as there is nothing in the context of the agreement, or in the record of this case, tending to support such an interpretation. It is equally true that the record is silent as regards any other construction to be given it.

But it is a familiar rule, and one of universal application, that, when the language of a contract is equally susceptible of two or more constructions, courts will invariably adopt that which will sustain the contract, rather than one which will destroy it.

In our opinion it is not the duty of courts of justice to rummage through nebulous subtleties of nicely-drawn theories of counsel, in order to discover some technicality or seeming defect upon which to impale a contract, and hold it void; but, on the contrary, it is the policy of the law that contracts should be sustained and enforced when this can be done without violence to the language used or the rules of construction.

It is this view of the law, we apprehend, that has resulted in a somewhat subtle and metaphysical interpretation, by the courts, of the statute sought to be invoked in the case at bar, by which it has been emasculated of much of its strength, and many of its functions.

We see no good reason to hold the word "season," as employed in the agreement, has reference alone to a period of the year subsequent to the 5th day of June; but, in our opinion, it embraces within its scope and meaning that season of the year which, by reason of the severely rigorous climate of this latitude, such work as the building of houses is necessarily confined, to-wit, from the 1st of April until the 1st of December of each year.

It may be said that we are driven *dehors* the record in order to arrive at this conclusion. We answer that we are driven to this conclusion by the exercise of common sense, aided by everyday experience and observation, the circumstances under and object for which the contract was made, the which courts are bound to do, in order to give to language the force and effect intended by the parties using it.

We therefore conclude that it was optional with defendant Sharlow, under the terms of the agreement, to have completed these houses and barns at any time during the building season of the years 1883 and 1884, and that said agreement is not void, but in all respects a good and valid contract.

The next question presented for our consideration is the validity of plaintiffs' lien, as it stands upon the record of the clerk's office. It is conceded that the lien, when first filed of record, by reason of an error in the description of the land, could create no charge upon the property now in controversy. It is contended by counsel for respondents, not without some plausibility, that the change or correction made in the description of the lands by plaintiffs on the 7th of November, 1884, several days after the lien was first filed, was illegal and void.

Under the law, plaintiffs had 90 days from the date of the last delivery of lumber, the 10th day of September, 1884, in which to file their lien. Code Civil Proc. § 662. This being true, plaintiffs had the right, if dissatisfied with the lien as first filed, to amend it, or prepare and file a new one, at any time within the said 90 days. This is conceded by counsel for respondents; but they contend it could not be amended in this

way, because the lien had previously been filed, and thereupon became a public record; and the clerk not only had no authority, but acted in violation of the law, in changing it, or permitting it to be done. The manner of correcting the error in the lien was clearly irregular, and, perhaps, so far as the clerk is concerned, a technical infringement of the law; but the fact remains that the erasure and correction were made, and, as thus corrected, the lien conformed to the actual facts in the case. Hence the question for our determination is, was the lien, as it stood upon the record after correction, invalid, by reason of the manner in which it was made to speak the truth? As the clerk, at the time of correcting the error, indorsed in writing on the lien, fully and clearly, all that had been done in the premises, it seems to us, though somewhat irregular, it was, in effect, the filing of a new lien; the erasures and alterations having destroyed the old one, for which, it may be, the clerk is liable to prosecution. But that fact, it seems to us, will not invalidate the new or corrected lien. Suppose the clerk had, at the instance of the plaintiff Durstine, withdrawn the lien from the files, and destroyed it by burning, would it be contended that this act would have deprived the plaintiffs of the right to file a new one at any time within the 90 days prescribed by law? Clearly not. Then, how can it be said that the act of the clerk, in destroying or mutilating the old lien, invalidated the new or corrected one, which, we hold, was thereupon filed of record, as evidenced by the written indorsement of the clerk made at the time?

It cannot be said that the lien, as corrected and filed, could possibly mislead, as it would most certainly give to any one examining it correct information touching the nature, the amount of the claim therein, and the land sought to be charged therewith. It was done within the 90 days, during which time the law imputes constructive notice, to all persons whatsoever, of the lien, whether filed of record or not.

We can therefore see no reason to hold the lien invalid because of the irregularity attending its recording or filing; but, on the

contrary, we deem it a good and valid lien, and, as it stood upon the records, was constructive notice to all subsequent purchasers and incumbrancers. The judgment is reversed.

All the justices concurring.

SAWYER et al., Respondents, v. RECTOR, Appellant.

1. Bankruptcy — Discharge, Effect of — Fraud of Bankrupt — Want of Notice to Creditors.

To an action for indebtedness the defendant pleaded and proved a discharge in bankruptcy, founded upon his petition filed after the existence of the debt provable in bankruptcy. *Held*, under the U. S. R. S. §§ 5117-5120, that the discharge was a full and complete bar to the action, though it was found that the defendant willfully omitted from his list of creditors the names of the plaintiffs; that he knowingly and willfully concealed their names from the marshal, that notice might not be given them, in order that he might be adjudged a bankrupt, and procure his discharge; that the plaintiffs had no knowledge of the bankruptcy proceedings until nearly three years after the granting of the discharge.

2. Same—Collateral Attack.

In such case the discharge cannot be attacked collaterally. It must be contested in the court granting it, in an application to annul on the grounds of fraud, or by a direct proceeding in some other court having jurisdiction.

3. Nature of Bankruptcy Proceedings.

Proceedings in bankruptcy relate to the estate of the debtor and its application to the payment of his debts, and are in the nature of proceedings *in rem*. The petition, schedule, and inventory required to be filed are only incidents in the course to be pursued in bringing his estate into court for adjudication.

4. Object of the Law.

The real object of the bankrupt law is to relieve the debtor from the burden of his debts when he surrenders his estate to the assignee for the benefit of his creditors.

5. Jurisdiction of Courts of Bankruptcy.

Whether a district court of the United States, acting as a court of bankruptcy, is one of general or limited jurisdiction, not determined; but, if it is of limited and special jurisdiction, the sufficiency of the proof upon which the court took its action is not open to collateral inquiry.

(Argued May 20, 1887; reversed May 26; opinion filed February 23, 1888.)

Appeal from the district court of Cass county; Hon. Wm. B. McCONNELL, Judge.

Action by Samuel A. Sawyer, David L. Wallace, and Thomas Miller, partners under the name of Sawyer, Wallace & Co., against the defendant to recover for services and money advanced. The defendant set up a discharge in bankruptcy. The plaintiffs had judgment, and the defendant appealed.

Miller & Greene and J. R. Gamble, for appellant.

Under the provisions of the bankrupt law, and in view of the findings of the trial court, we contend it had no authority to declare that the plaintiffs' claim is exempted from the operation of the defendant's discharge. It could only be impeached in the court where granted, for the reason that the ground upon which it is sought to avoid the discharge is one of those specified in section 5110 of the Revised Statutes of the United States. It is well established that the United States courts have exclusive jurisdiction in all cases where the discharge is attacked upon the grounds specified in that section. *Way v. Howe*, 108 Mass. 502; *Burpee v. Sparhawk*, Id. 111; *Benedict v. Smith*, 48 Mich. 593, 12 N. W. Rep. 866; *Black v. Blazo*, 117 Mass. 17; *Corey v. Ripley*, 57 Me. 69; *Bailey v. Carruthers*, 71 Me. 172; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12; *Rayl v. Latham*, 27 Ohio St. 452; *Milhans v. Awardi*, 51 Ala. 594; *Poillon v. Lawrence*, 77 N. Y. 207; *Hudson v. Bingham*, 12 Amer. Law Reg. 637; *Reed v. Bullington*, 49 Miss. 223; *Payne v. Able*, 7 Bush, 341; *Bump*, Bankruptcy, (10th Ed.) 773.

This construction is in perfect accord with the settled law in relation to judgments as it has been announced by the highest courts of this country. *Christmas v. Russell*, 5 Wall. 290; *D'Arcy v. Ketchum*, 11 How. 165; *Webster v. Reid*, Id. 437; *Mills v. Duryee*, 7 Cr. 481; *Bicknell v. Field*, 8 Paige, 440.

If the notice required by section 3109, referred to in the thirteenth finding of fact, has been duly published, the discharge will bar the debt, although the name of the creditor was not

placed on the schedule, or any notice given to him. *Symonds v. Barnes*, 39 Me. 191; *Randall v. Sutton*, 2 Houst. 510; *Knab v. Hayes*, 71 N. C. 109; *Stern v. Nussbaum*, 47 How. Pr. 489; *In re Archenbrann*, 7 C. L. N. 99; *Blum v. Ricks*, 89 Tex. 112; *Hood v. Spencer*, 4 McLean, 168; *Pattison v. Wilbur*, 10 R. I. 448; *Burnside v. Brigham*, 49 Mass. 75; *Thurmond v. Andrews*, 10 Bush, 400; *Thomas v. Jones*, 89 Wis. 124; *Heard v. Arnold*, 56 Ga. 570; *Jones v. Knox*, 51 Ala. 367; *Thornton v. Hogan*, 63 Mo. 143, (3 Cent. L. J. 719;) *Bump, Bankruptcy*, (10th Ed.) 750; *Allen v. Thompson*, 10 Fed. Rep. 116.

This notice is the one that must be duly published in order to give the district court jurisdiction over the creditors who are not notified personally. See *Pattison v. Wilbur* and *Thurmond v. Andrews*, *supra*.

All proceedings under the bankruptcy act were in the nature of proceedings *in rem*, hence the broad jurisdictional effect of the publication of these notices. See *Waples*, Proc. in Rem. 110, 111; *Michaels v. Post*, 21 Wall. 391; *Rayl v. Latham*, 27 Ohio St. 452; *Shawhan v. Wherritt*, 7 How. 627; *Benedict v. Smith*, 48 Mich. 593, 12 N. W. Rep. 866.

Stone & Newman, for respondent.

While the discharge may be valid as to other creditors, it is invalid as to creditors whose names are fraudulently omitted from the schedules, and the provisions of the law for setting aside the discharge altogether do not prevent such creditors from showing that it is invalid as to them in any tribunal where other creditors are not concerned. *Bump, Bankruptcy*, (7th Ed.) 643; *Poillon v. Lawrence*, 77 N. Y. 207; *Batchelder v. Lowe*, 43 Vt. 662; *Burnside v. Brigham*, 8 Metc. (Mass.) 49; *Knab v. Hayes*, 71 N. C. 109; *Downer v. Dana*, 22 Vt. 337; *Lamb v. Brown*, 12 N. B. R. 522; *Platt v. Parker*, 13 N. B. R. 14; *Barnes v. Moore*, 2 N. B. R. 573; *Magoner v. Warfield*, 3 G. Greene, 293; *Mitchel v. Singletary*, 19 Ohio, 291; *Hubbard v. Cramp*, 11 Paige, 341; *Platt v. Parker*, 4 Hun, 135; S. C. 6 Thomp. & C. 377; *Michaels v. Post*, 21 Wall. 398; *Bump, Bankruptcy*, § 5119.

The provisions of section 5120, Rev. St. U. S., apply only to cases where the discharge was fraudulently obtained upon the grounds specified in section 5110, which grounds relate to the validity of the discharge itself, and have no reference to the question whether a particular debt is discharged, or a particular debtor barred from maintaining suit upon his claim against the bankrupt.

Section 5110 nowhere, even by implication, specifies a fraudulent omission of creditors from schedules, or fraudulent concealment from the creditors of the fact that proceedings are pending, as a ground for invalidating the discharge.

This is not a case coming within the provisions of that section. See *Poillon v. Lawrence*, *supra*.

The bankrupt act is intended to deprive creditors of all remedy for the recovery of their debts, and should be strictly construed, and not extended beyond a fair and legitimate meaning of the terms used by congress. *Salters v. Tobias*, 3 Paige, 338.

The district court of the United States had no jurisdiction of the persons of respondents in the bankruptcy proceedings of appellant.

The position of appellant is that, the record being silent as to the facts which gave jurisdiction to the bankruptcy court, such jurisdiction will be presumed.

It is true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly, but is the district court of the United States, acting as a court of bankruptcy, a superior court of general jurisdiction?

In *Ex parte Smith*, 94 U. S. 455, it is held that "the facts upon which the jurisdiction of the courts of the United States rests must in some form appear in the record of all suits prosecuted before them. To this rule there are no exceptions."

The powers of the bankruptcy courts are derived wholly from the statutes of the United States, are special and summary, and not exercised or brought into action according to the course of the common law.

It is conceded that if the notice required by the Revised Stat. v.5DAK.—8

utes, § 5019, had been duly published, and proof of such publication had appeared in the record of bankruptcy proceedings, the discharge would have been a bar to the debt of plaintiffs, if otherwise properly granted, and had been without fraud on the part of appellant.

It is by this notice that bankruptcy courts obtained jurisdiction of the persons of creditors who were not personally served with the notice required by section 5019. *Pattison v. Wilson*, 10 R. I. 448.

The distinction in the presumption of law, when applied to proceedings in courts of general jurisdiction acting within the scope of their general powers, and when applied to those proceedings had under special statutory authority, is stated in *Gulpin v. Paige*, 18 Wall. 350. See, also, *Harvey v. Tyler*, 2 Wall. 328; *Morse v. Fowler*, 5 Fost. (N. H.) 302; *McNinn v. Wheeler*, 27 Cal. 30; *Ricketson v. Richardson*, 26 Cal. 149; *Jordan v. Giblin*, 12 Cal. 100; *Oakley v. Aspinwall*, 4 N. Y. 513; Wells, Jurisdiction, 36; Freeman, Judgments, 122-124, 127, 133.

The claim of respondents against appellant was property.

If the position of appellant be correct, the plaintiffs have been deprived of this property without notice, and without opportunity to be heard, and by the judgment of a court of special and limited jurisdiction proceeding under statutory authority, and in a manner unknown to the common law.

The discharge of appellant, if obtained without the notice provided by law to the respondents, cannot affect their rights, or bar their recovery in this action.

Stuart v. Palmer, 74 N. Y. 183, 192; *Harris v. Hardeman*, 14 How. 14; *Boswell's Lessees v. Otis*, 9 How. 336.

The provisions of section 5119, R. S. of U. S., that the certificate of discharge shall be conclusive evidence in favor of the bankrupt of the fact of the regularity of his discharge, cannot have the effect of dispensing with the notice to creditors required by the statute. It relates simply to the mode of proof of the discharge, and not to its effect when proved.

The provision simply substitutes the certificate of discharge

for such proof, and declares that it shall have the same effect. It does not prevent creditors from contesting the validity of the discharge by showing that it was obtained in proceedings of which he was fraudulently deprived of notice. *Batchelder v. Lowe*, 43 Vt. 662; *Burpee v. Sparhawk*, 4 N. B. R. 685.

It is claimed that the proceedings of the bankruptcy court are proceedings *in rem*, and that therefore a different rule prevails than in any proceedings where a personal judgment is demanded. So far as the estate of the bankrupt is concerned, the proceedings are proceedings *in rem*, but so far as his discharge operating as a bar to suits by his creditors, and so far as the proceedings affect the property rights of such creditors, it is a proceeding *in personam*, and as to such creditors the same rules prevail as in any other case where personal judgment is sought.

FRANCIS, J. This action comes up on appeal from the district court in and for the county of Cass. The plaintiffs (respondents) brought their action in the district court against the defendant (appellant) to recover the sum of \$7,292.23, with interest, alleged to be due from the defendant to them for certain services performed by them for said defendant, the firm of Woodcock & Rector, of which he was a member, and for money paid, laid out, and expended for, and loaned and advanced to, the said firm by them.

The defendant, answering, admitted the partnership between himself and Woodcock; that April 28, 1878, he filed a petition in the district court of the United States for the district of Kentucky, setting forth a list of his creditors, and their respective places of residence, and the amount due to each, and also an inventory of his property, rights, credits, and effects of every kind and nature, and alleging that he was a resident and citizen of the said district of Kentucky, and was owing debts which had not been created in consequence of a defalcation of a public officer, or as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, and that he was unable to pay said debts; which petition was duly verified by

his oath; and prayed that he be declared and adjudged a bankrupt by a decree of said court, and discharged from the payment of said debts; that afterwards he was by said court duly adjudged a bankrupt; that he then filed his petition in said court, praying for a discharge from all his debts, and a certificate of such discharge; that his creditors and all parties in interest were duly notified to appear and to show cause; that the defendant, having fully complied with the requirements of the act of congress in relation thereto, and the orders of the court, was, on the 15th day of January, 1880, duly declared by said court entitled to his discharge from his debts, and a certificate thereof; and that a decree was then and there rendered by said court discharging the defendant from all his debts, and a certificate thereof given him,—a copy of which was annexed, and marked "Exhibit A," and made a part of the answer.

The defendant further alleged in his said answer that the cause of action set forth in the complaint of the plaintiffs was due and owing to the plaintiffs before and at the time he filed his said petition, and was so declared a bankrupt, and said debt was one provable against his said estate in bankruptcy, and was set forth among others in his list and schedule of his creditors, and he was therefrom discharged by said proceedings in bankruptcy; and said debt was not created in consequence of a defalcation of a public office, or as an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity. Wherefore defendant prayed that the action be dismissed, and that he recover his costs.

On the trial in the district court, all the material allegations of the complaint being admitted, the plaintiffs in the first instance offered no testimony. Defendant then offered in evidence the certificate in discharge in bankruptcy, which was admitted without objection, marked "Exhibit A," as follows:

"EXHIBIT A.

"District Court of the United States, District of Kentucky, at Louisville—act.:

"5547.

"Whereas, James Rector has been duly adjudged a bankrupt under the act of congress establishing a uniform system of bankruptcy throughout the United States, and has filed the assent, in writing, of one-fourth in number and one-third in value of his creditors to whom he is liable as principal debtor, and who have proved their claims, and appears to have otherwise conformed to all the requirements of the law in that behalf:

It is therefore ordered by the court that said James Rector be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the 28th day of April, 1878, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

"Given under my hand and the seal of the court, at Louisville, in said district, this 15th day of January, A. D. 1880.

[Signed]

"W. H. HAYES, Judge."

[Seal of the Court.]

Thereupon the defendant rested. The plaintiffs then offered in evidence a certified transcript of the record of the proceedings in bankruptcy, for the purpose of showing that the names of these plaintiffs nowhere appeared therein as creditors of this defendant, and for the purpose of showing that no notice, such as is required by the bankrupt law, was ever served upon the plaintiffs, and that they were in nowise parties to the proceedings in bankruptcy.

To the introduction of this the defendant objected upon the ground that it was immaterial and incompetent,—immaterial for the reason that the discharge is conclusive evidence as to the

regularity of the proceedings in bankruptcy, and also of the fact that due notice had been given in such proceedings. And defendant further objected to said transcript as evidence of the fact that the plaintiffs were not listed as creditors of the defendant in the bankruptcy proceedings, for the reason that it is immaterial in this action whether or not the plaintiffs were so listed, or whether the plaintiffs as such creditors were actually notified of the bankruptcy proceedings.

Objections overruled by the court, and defendant excepted. Upon the conclusion of the trial, which was to the court, a jury having been expressly waived by both parties, the defendant, among other findings, asked the court to find, as the fifth finding of fact, "that on the said 28th day of April, A. D. 1878, the said Woodcock & Rector and the said defendant were indebted to the plaintiffs on said account in the sum of seven thousand two hundred ninety-two dollars and twenty-three cents, which said sum was due and payable on said last-mentioned date;" and, as the sixth finding of fact, "that on the 28th day of April, 1878, the defendant duly filed a petition in the district court of the United States for the district of Kentucky, which said petition was made and filed in accordance with the provisions of chapter 2 of title 61 of the Revised Statutes of the United States in relation to bankruptcy, and thereby prayed to be declared and adjudged a bankrupt by a decree of said court, and discharged from the payment of his debts, and from the payment of the debts of said copartnership of Woodcock & Rector;" and, as the seventh finding of fact, "that afterwards, and on the 15th day of January, A. D. 1880, the said defendant was duly declared by said court entitled to a discharge from his debts, and from the debts of the said firm of Woodcock & Rector, and to a certificate thereof; and that a decree was then and there rendered by said court discharging said defendant from all his debts, and a certificate thereof given him." And the defendant further asked the court to make and find, among other conclusions of law, the following:

"1. That the said indebtedness of the said firm of Woodcock

& Rector was one provable against the estate of the said defendant in bankruptcy.

"2. That said defendant was duly discharged from said indebtedness by said proceedings in bankruptcy.

"3. That the defendant is entitled to judgment herein against said plaintiffs for his costs and disbursements."

The court refused to find, as requested by defendant, the said fifth, sixth, and seventh findings of fact, and also refused to make and find the said first, second, and third conclusions of law, as requested by the defendant; to which refusals of the court the defendant duly entered his exceptions.

Thereupon the court made and found, among other findings of fact, the following:

"2. That during the years 1874 to 1877, inclusive, the defendant and one G. B. Woodcock were partners, doing business under the firm name and style of Woodcock & Rector.

"3. That during the period aforesaid, and prior to the 28th day of April, 1878, the said Woodcock & Rector, the said defendant, became indebted to the plaintiffs, on account of services performed, and for money paid out and expended, and loaned and advanced, to said Woodcock & Rector, by said plaintiffs, at the request of said Woodcock & Rector and of said defendant, in the sum of eight hundred and eighty-four thousand six hundred and forty-nine dollars and forty cents.

"4. That no part of said indebtedness has ever been paid, except the sum of eight hundred and seventy-seven thousand three hundred and fifty-seven dollars and seventeen cents, which said sum was paid prior to the said 28th day of April, A. D. 1878.

"5. That on the 1st day of May, A. D. 1878, the said Woodcock & Rector and the said defendant were indebted to the plaintiffs, on said account, in the sum of seven thousand two hundred and ninety-two dollars and twenty-three cents, which said sum was due and payable on said last-mentioned date.

"6. That on the 28th day of April, 1878, the defendant filed a petition in the district court of the United States for the district of Kentucky, which said petition was made and filed in

form and manner as provided in chapter 2 of title 6 of the Revised Statutes of the United States in relation to bankruptcy; and thereby prayed to be adjudged a bankrupt within the purview of said act, and that he might be decreed and have a certificate of discharge from all his debts provable under the same.

"7. That, upon the filing of said petition, the register of bankruptcy in and for said district issued a warrant, signed by said register, directed to the marshal of said district, authorizing and directing him, forthwith, as messenger, to publish a notice two times in such newspaper as said marshal should select; that on the 30th day of April, A. D. 1878, a warrant of bankruptcy was issued against the estate of said defendant, who had been adjudged a bankrupt by his own petition; that a meeting of the creditors of said bankrupt to prove their debts, and to choose one or more assignees of his estate, would be held at a court of bankruptcy to be holden at Russellville, Ky., before said register, on the 16th day of May, 1878, at ten o'clock A. M. of said day; and said marshal was by said warrant further directed to serve written or printed notice by mail, or personally, upon the creditors upon the schedule filed with the defendant's said petition, or whose names might be given to him in addition thereto by the defendant, and to give such personal or other notice to any persons concerned as the said warrant specified.

"8. That the schedule of said defendant, filed with his said petition, did not contain a full and true statement of all his debts, exhibiting as far as possible to whom each debt was due, and did not contain either the names, place of residence, or amount of the claim, of these plaintiffs.

"9. That said defendant willfully omitted from said schedule the names and amount of the claim of these plaintiffs; and willfully concealed from the plaintiffs the fact that proceedings to have himself adjudged a bankrupt had been commenced; and knowing and willfully neglected to give the names of these plaintiffs to said marshal in order that said written or printed notice might be served upon them.

"10. That each of the admissions of fact was for the purpose of concealing from these plaintiffs the fact that proceedings had been commenced for the purpose of having said defendant adjudged a bankrupt; that no petition or printed notice was ever served upon these plaintiffs, by mail or personally, as directed by said warrant, and plaintiffs did not know that such bankruptcy proceedings had been commenced, until the month of November, 1883.

"11. That on the 9th day of July, 1878, the said defendant filed in said United States district court his petition praying that he might be decreed by the court to have a full discharge from all his debts provable under such bankrupt act, and a certificate thereof granted according to such act.

"12. That, upon such application for such discharge being made, said district court ordered notice to be given by mail to all creditors of the defendant who had proved their debts, and by publication two times, once a week, in the Bowling Green Democrat, that a hearing would be had on said petition on the 24th day of July, 1878, before said court, at the office of said register, at Russellville, in said district, at 10 o'clock A. M., and that all creditors who had proved their debts, and all other persons in interest, might appear at said time and place, and show cause, if any they had, why the prayer of said petition should not be granted.

"13. That such notice was never served upon these plaintiffs, either personally or otherwise, and was not published in said Bowling Green Democrat, or in any other newspaper.

"14. That afterwards, on the 15th day of January, 1880, a certificate of discharge in bankruptcy was by said court issued to the defendant, Rector, which certificate was in the words and figures following, to-wit:—

Here follows a copy of the certificate of discharge offered in evidence by the defendant, and marked "Exhibit A," and hereinbefore set forth.

The court also made and filed the following conclusions of law, namely:

"1. That said district court of the United States obtained no jurisdiction of the plaintiffs in this action in said bankruptcy proceedings.

"2. That said defendant fraudulently concealed from the plaintiffs in this action the pendency of said proceedings, and fraudulently prevented said plaintiffs from receiving any notice thereof.

"3. That said defendant was not discharged from the debt sued on in this action by said certificate of discharge in bankruptcy.

"4. That the plaintiff is entitled to judgment against the defendant—

"First, for the sum of seven thousand two hundred and ninety-two dollars and twenty-three cents, with interest thereon, at the rate of seven per cent. per annum from and after the 1st day of May, 1878;

"Second, for his costs and disbursements in this action, to be taxed by the clerk of this court according to law."

To the ninth, tenth, and thirteenth findings of fact, and to the first, second, third, and fourth conclusions of law, defendant duly excepted.

Among other errors assigned on behalf of the defendant, (appellant,) it is alleged that the court erred in refusing to find the said fifth, sixth, and seventh findings of fact requested by the defendant; and also in refusing to find the first, second, and third conclusions of law requested by the defendant, and in finding the ninth, tenth, and thirteenth findings of fact in favor of the plaintiffs; and also in finding the first, second, third, and fourth conclusions of law in favor of the plaintiffs.

April 19, 1887, judgment was rendered in favor of the plaintiffs, and against the defendant, for the sum of \$11,863.66, together with the costs and disbursements of the action.

The defendant appealed to this court.

It is apparent, from this statement of the case, that the plaintiffs seek to attack, collaterally, the discharge in bankruptcy granted to the defendant, and have it declared of no effect as to

a debt claimed to be due to them from the defendant, in and by their action brought in the territorial district court to recover the amount of said debt.

The discharge in bankruptcy, when properly pleaded, is conclusive in a case of this kind, and cannot be attacked collaterally, but may be contested in an application to annul it on the ground that it was fraudulently obtained, made in the court which granted it, within the time, and in the manner, and for the reasons, set forth in the bankrupt law, or by a direct proceeding in some other court having competent jurisdiction.

It appears in the case, "and the court so found," that the defendant was indebted to the plaintiffs in the sums claimed in the complaint, aggregating, as to the principal, \$7,292.23; that January 15, 1880, a certificate of discharge in bankruptcy was issued to the defendant, as alleged in his answer.

It is also manifest, from the pleadings and proof and findings of the court, that the said debt on which this action was brought was, as to said principal sum, contracted, and arose and existed, prior to April 28, 1878, the date when defendant filed his petition praying to be adjudged a bankrupt, and that therefore said indebtedness was, as to said principal sum thereof, an indebtedness provable against the estate of the said defendant when he filed his said petition.

Proceedings in bankruptcy under the United States bankrupt laws relate to the estate of the debtor and its application to the payment of his debts, and are in the nature of proceedings *in rem*, and his discharge is the result of the proceedings against, and disposition of, his estate. As to the proceedings being in the nature of proceedings *in rem*, see *Shawhan v. Wherritt*, 7 How. 627; *Lamp Chimney Co. v. Copper Co.*, 91 U. S. 656, and cases cited; *Thornton v. Hogan*, 63 Mo. 143. In *Benedict v. Smith*, 48 Mich. 593-595, 12 N. W. Rep. 866, the plaintiff sued the defendant to recover upon a note given by defendant to Fletcher Benedict, and by him indorsed to plaintiff. The defendant pleaded the general issue, with a special plea of discharge in bankruptcy, and in sup-

port of this special plea introduced the records of the bankruptcy court, showing a full discharge. It appeared from the files that the name of Fletcher Benedict did not appear as a creditor anywhere in the (bankruptcy) proceedings, although he then held the note, and he was not shown to have been served with any notice, as was required by the bankrupt law. The plaintiff therefore claimed that the discharge in bankruptcy was void as to said Fletcher Benedict, for the reason that the bankrupt court never obtained jurisdiction of his person. In the opinion of the court, COOLEY, J., said: "If bankruptcy proceedings were strictly proceedings *in personam*, this view would be unanswerable; but this is not the case. Jurisdiction over the estate empowers the court to make decree, and the decree is conclusive upon claims unless attacked for fraud in the bankruptcy court itself. Rev. St. U. S. 1878, § 5120. It cannot be attacked collaterally in other courts."

The petition, schedule, and inventory required to be filed are only incidents or steps in the course pursued to bring his estate into the sight and hands of the court, in order that it may, in its very substance, be adjudicated upon, and appropriated to the liquidation of his liabilities. And only the debts or claims provable against his estate are passed upon, and it is from these only that, by the final discharge, he is released.

The real object of the bankrupt law is to relieve the debtor from the burden of his debts when he surrenders his estate to his creditors, and to put it in the hands of an assignee for their benefit; and it is only upon the surrender of his estate, and its application to the payment of his debts, in the manner required by law, that he is entitled to his discharge.

I now, for a more proper understanding of the points under discussion, quote several sections of the United States Revised Statutes:

"Sec. 5117. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and

the dividend thereon shall be a payment on account of such debt.

"Sec. 5118. No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

"Sec. 5119. A discharge in bankruptcy, duly granted, shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded, by a simple averment, that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of the discharge.

"Sec. 5120. Any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same," etc.

The discharge in bankruptcy, then, which was properly pleaded by the defendant, was, under the express provision and sanction of law, a full and complete bar to the suit of the plaintiffs brought on the debt which was due to them from the defendant, and provable against his estate, when he filed his petition in bankruptcy, and it could not be impeached collaterally in said suit.

The discharge itself, by the very terms of the certificate, asserts that James Rector, defendant, "has been duly adjudged a bankrupt," "has filed the assent, in writing, of one-fourth in number and one-third in value of his creditors to whom he is liable as principal debtor, and who have proved their claims, and appears to have otherwise conformed to all the requirements of the law in that behalf."

Under the provision of law before quoted, making the certificate of discharge conclusive evidence in favor of the bankrupt of the fact and the regularity of such discharge, and with the statement of the certificate in the language of the court, attested by the hand of the judge and the seal of the court above referred to, it must be presumed, in the absence of competent evidence to the contrary, in a proper legal proceeding directed against the validity of the discharge itself, that the bankrupt has complied with all the requirements of the bankrupt law necessary to be complied with in order to entitle him to his discharge. And in this case, as presented to us by the record, the trial court erred in finding and holding that the notice required to be served and published by section 5109, U. S. Rev. St., was never served and was not published; and in finding and holding that the district court of the United States, which granted the discharge to the defendant, obtained no jurisdiction of the plaintiffs in this action in said bankruptcy proceedings; and in finding and holding that the defendant was not discharged from the debt sued on in this action by said certificate of discharge in bankruptcy; and in finding and holding that the plaintiffs were entitled to judgment against the defendant; and in rendering judgment against the defendant.

The court having no power to collaterally inquire into, nor impeach, nor go behind, the certificate of discharge pleaded in the action, also erred in finding and holding (ninth finding of fact) that said defendant willfully omitted from said schedule the names and amount of the claim of the plaintiffs, and willfully concealed from the plaintiffs the fact that proceedings to have himself adjudged a bankrupt had been commenced, and knowingly and willfully neglected to give the names of these plaintiffs to said marshal in order that said written or printed notice might be served upon them; and in making the second conclusion of law thereon,—“that said defendant fraudulently concealed from the plaintiffs in this action the pendency of said proceedings, and fraudulently prevented said plaintiffs from receiving any notice thereof.”

"When the discharge is pleaded, the court will presume that the requirements of the law in regard to notice to creditors were complied with, and, consequently, that they were parties to the proceedings in bankruptcy." *Lathrop v. Stuart*, 5 McLean, 167.

"The district court must be presumed to have proceeded regularly, according to the jurisdiction granted, until the contrary appears," (*Morrison v. Woolson*, 23 N. H. 11,) that is, until the contrary appears from, or is shown by, competent evidence. See *Bump, Bankr.* (8th Ed.) 730. "The discharge cannot be impeached collaterally on account of defects and irregularities in the proceedings between the petition and the discharge." *Id.*, and cases there cited. "A decree of a district court in a bankruptcy case is conclusive of the fact decreed except when it is called in question in the court where it was entered, or by some direct proceedings in some other court of competent jurisdiction." "Decrees in bankruptcy are entitled to the same verity, and are no more liable to be impeached collaterally than any other judgments or decrees rendered by courts possessing general jurisdiction." *Michaels v. Post*, 21 Wall. 398. "Decrees of the district court rendered in pursuance of the power conferred by the bankrupt act are entitled in every other court to the same force and effect as the judgment or decrees of any domestic tribunal, so long as they remain unreversed, and are not annulled. *Lamp Chimney Co. v. Copper Co.*, 91 U. S. 656. In a recent Massachusetts case, (May 7, 1887,) like the one at bar in the main essentials, in which defendant pleaded his discharge in bankruptcy, and the plaintiff in his replication alleged that, if the discharge had been granted, it was obtained without the knowledge of the plaintiff, who averred that he received no notice of the filing of defendant's petition in bankruptcy, or of the proceedings thereon; and that, if any proceedings were ever had, plaintiff's claim was not included in defendant's schedule of creditors; and that such omission was made knowingly, willfully, and fraudulently; and that, if defendant should prove the fact of his discharge as alleged, it in no manner con-

stituted a defense to the cause of action; in which case also the discharge in bankruptcy was put in evidence, together with a certified copy of defendant's schedule of creditors, from which plaintiff's claim was omitted; and in which case plaintiff testifies that he had no knowledge of defendant's discharge until the expiration of the year 1881, (the discharge bearing date April 15, 1879,) and that he had frequent interviews with the defendant between the maturity of the note (July, 1872) and the expiration of 1881, defendant saying, among other things, "I have not forgotten you; I shall never forget your kindness, and I hope soon to be able to pay all my creditors;" and in which case the plaintiff requested several rulings to the effect that if defendant knew, at the time of filing his schedule, that plaintiff was a creditor, and fraudulently omitted his name, and if plaintiff had no knowledge of defendant's bankruptcy proceedings until after two years from his discharge, the plaintiff, as a matter of law, is not a party to the proceedings, and the discharge is not *res adjudicata* to him, and is not necessarily a bar to plaintiff's claim;—the court refused to rule as requested, and found for defendant, and C. ALLEN, Judge, in the opinion of the court, held the doctrine, stated in the syllabus, that "the validity of a discharge under the United States bankruptcy act can only be contested by application in the United States district court within two years, as provided by U. S. St. 1867, c. 176, § 34; and it makes no difference that the plaintiff's name was fraudulently omitted from the schedules, and that he knew nothing of the discharge until after the two years had passed." The opinion and the syllabus fully agree. *Fuller v. Pease*, 11 N. E. Rep. 694.

The attorneys for the respondent raised the query, "is the district court of the United States, acting as a court of bankruptcy, a superior court of general jurisdiction?" and upon the theory that it is not, and that its powers "are special and summary," assert, quoting from *Ex parte Smith*, 94 U. S. 455, that "the facts upon which the jurisdiction of the courts of the United States rests, must in some form appear in the record of

all suits prosecuted before them. To this rule there are no exceptions."

Without determining the question thus raised as to the limited or general jurisdiction of the district courts of the United States in bankruptcy proceedings, it may be said that, even if they are courts of limited and special jurisdiction or authority, "the sufficiency of the proof upon which the court took its action is not a matter open to consideration in a collateral manner." *Comstock v. Crawford*, 3 Wall. 396.

On a review of the entire case as brought up by the record, it is manifest that the court erred in not finding for the defendant. The judgment of the district court is reversed.

All the justices concurring, except THOMAS, J., not sitting.

POLK, Appellant, v. MINNEHAHA COUNTY, Respondent.

Office and Officer—Changing Salary of District Attorney during Term.

During the term previous to P.'s acting as district attorney the salary had been \$1,200 per annum, fixed at the beginning of that term. The statute (Laws 1885, p. 83,) provided that the district attorneys shall receive such salary as the board of county commissioners of their respective counties shall allow, but the salary "shall not be diminished during the term for which they shall be elected." On the day P.'s term began, an hour or more after he had qualified, the commissioners fixed the salary at \$700 per annum. *Held* it was in violation of the statute, and that P. was entitled to compensation at the rate of 1,200 per annum.

PALMER, J., dissenting.

(Argued May 20, 1887; reversed May 26; opinion filed February 28, 1888.)

Appeal from the district court, Minnehaha county; Hon. C. S. PALMER, Judge.

Winsor & Kittredge and *H. T. Root*, for appellant.

A public office is a right to exercise a public employment. The right to the fees and emoluments are stated to be co-exten-
v.5DAK.—9

sive with the office. The fees are incident to it, as fully as are the rents and profits of lands. *Mayfield v. Moore*, 52 Ill. 431; 2 Blackstone, 86; *Cox v. City of Burlington*, 43 Ia. 614.

The object of this statute is to prevent county boards from intermeddling with the compensation of an officer after his term of office has commenced. *Purcell v. Parks*, 82 Ill. 351; *Cox v. City of Burlington*, 43 Ia. 614; *Douville v. Manistee Supervisors*, 40 Mich. 588.

The salary, when once fixed by the board of county commissioners, is a continuing one until further action is taken by the board. *Farwell v. Rockland*, 62 Me. 301; *Cox v. City of Burlington*, *supra*.

The term of office of district attorney begins on the first Monday of January after election, and he must qualify and enter upon the duties of his office on that day, or within 10 days thereafter. Pol. C. c. 5, §§ 9, 10.

He holds his office for the term of two years, and until his successor is elected and qualified. Sess. Laws 1883, c. 43, § 1.

The board of county commissioners shall not diminish salary during the term for which he is elected. Sess. Laws 1885, c. 45, § 1.

If this old salary continued until further action of the board, then any action the board might take in regard to it would be in the nature of a change, or, in this case, a reduction.

This being so, the next important question is, when did plaintiff's "term" commence? The statute plainly says, "on the first Monday of January," and it makes it not only his right to enter upon the duties of his office on that day, but it prescribes a penalty for neglecting to do so for the period of 10 days.

Even if we concede that Mr. Wright's term of office extends after the first Monday of January, until his successor qualifies and enters upon the duties of his office, it can make no difference in this case, for the findings of fact show that plaintiff qualified and entered upon the duties of his office on that day, and an hour or more before the action of the board.

L. S. Swezey, for respondent.

On the first Monday of January, 1887, the old board of county commissioners met in regular session, approved the minutes of former meetings, and adjourned *sine die*.

The new board, including two members recently elected, immediately assembled, organized, and proceeded to business. As to this matter, the language of the record is:

"On motion, the salary of the district attorney was fixed at \$700 per annum."

Not diminished, but fixed. Why fixed, and why not diminished? Because, we say, this was the first opportunity for the board to act in the matter, because it was a matter in the line of duty, and wholly within the discretion of the board to "allow"—to fix—the salary of the district attorney. And the language shows the intent was to fix such salary, and not to diminish it.

The plaintiff had performed no duties, earned no compensation, had no contract with the county, was dependent upon the discretionary act of the county board in allowing his salary. If it was not satisfactory, he could resign.

The ultimate authority regulating the fees or salary of a public officer in any case is the legislature. This authority may, however, be delegated to any municipal board or other tribunal.

From the nature of this authority, it results that the duties and emoluments, in fact the office itself, and all that appertains thereto, may be abolished or changed at will by the legislature, or by the corporate authorities having the delegated power. *Dill. Mun. Corp.* 268, 269; *Connor v. Mayor*, 5 N. Y. 285; *Nichols v. MacLean*, 13 Amer. Corp. Cas. 152; *Butcher v. Camden*, 29 N. J. Eq. 478; *Iowa City v. Foster*, 10 Ia. 189; *Augusta v. Sweeney*, 44 Ga. 463; *People v. Detroit*, 38 Mich. 636.

A statute creating an office, fixing the compensation, and providing for its payment, does not create a contract between the officer and the public body. *Com. v. Bacon*, 6 Serg. & R. 322; *Love v. Jersey City*, 40 N. J. Law, 456; *City v. McBride*, 69 Ind. 244; *Smith v. Mayor*, 37 N. Y. 518.

Nor does it avail the appellant in this case to refer to the action of the county board two years before, at the January session, 1885, in fixing the salary of the district attorney at \$1,200 per annum.

The term of the former occupant expired immediately upon the qualification of the plaintiff. And, according to the argument of counsel, the board could not until the expiration of that term do any act to diminish the salary. They took no action to do so during the term. But immediately upon expiration of the term, and at the opening of the term of office of the incumbent elect,—at the first opportunity, we say,—on the first day of the regular session fixed by law, the board did fix the salary of the district attorney, and have done nothing else to diminish it.

The argument that the board cannot during any term of office diminish the salary, necessarily leads to the result that it must wait until the term expires. But when one term expires, another term begins, at the same instant, we will say. And the further proposition that the board cannot then fix any salary that would be a diminution of the salary before fixed, leads to the absurd conclusion that it must, at some prior session, allow the salary *in futuro*.

FRANCIS, J. This case was tried before the district court in and for Minnehaha county, without a jury, on an appeal from the action of the board of county commissioners of said county, purporting to fix the annual salary of the district attorney of said county.

The court, in making its findings of fact, found that at the general election in 1884, one E. G. Wright was elected as district attorney for said county for two years from the first Monday of January, 1885; that he duly qualified and acted as such district attorney during said term; that January 8, 1885, at a regular session of the board of county commissioners, the salary of the district attorney was fixed by the board at \$1,200 per annum, payable quarterly; that at the general election in 1886, A. A. Polk, the plaintiff, (appellant,) was duly elected as

district attorney for said county for the ensuing term of two years from the first Monday of January, 1887, being the 3d day of January, 1887; that on that day he duly qualified by taking and subscribing the oath of office and executing his official bond to the county in the sum, and with the two sureties, required by law, which bond was approved by the county clerk, and, with the oath of office written thereon, filed with said county clerk, January 3, 1887; and that since that date said A. A. Polk has acted and is now acting as district attorney; that at the regular session of said board of county commissioners held on said 3d day (first Monday) of January, 1887, being the first day of the session, and the same day on which the oath of office and bond of the plaintiff were filed, but some time—an hour or more—later on that same day, said board fixed the salary of the district attorney at \$700 per annum; that at a regular session of said board, April 4, 1887, the said A. A. Polk, the plaintiff, having presented his account for salary as district attorney for the first quarter of the year, in the sum of \$300, said board, on the 7th day of April, 1887, took action on the matter, and allowed the sum of \$175; that from this decision of the board the plaintiff took an appeal to this court.

Upon these findings of fact the court made the following conclusions of law, namely:

“And the court decides the law in this case as follows, to-wit:

“1. The decision of the board of county commissioners aforesaid, rejecting said account in the sum of three hundred dollars, and allowing one hundred and seventy-five dollars thereof, was according to law, and not erroneous in any respect.

“2. And the decision aforesaid should in all respects be affirmed and approved.”

On these findings of fact and conclusions of law judgment was thereafter, April 30, 1887, entered in favor of the defendant and against the plaintiff, approving and affirming the decision of said board, (rejecting the account of the plaintiff in the sum of \$300 for salary, and allowing \$175 thereof,) and awarding the defendant costs therein.

The one error assigned is as follows: "And the plaintiff herein says there is manifest error on the face of the record, in this: in making the conclusions of law on the findings of fact."

It is evident that the assignment is well taken, and that the court clearly erred in making its said conclusions of law upon the findings of fact stated.

The amendment to section 5 of the act entitled "An act to create the office of district attorney" for the several counties of Dakota Territory, approved March 7, 1883, which said amendment was approved March 13, 1885, (Sess. Laws 1885, p. 83,) provides that "the district attorneys shall receive such salaries for their services as the board of county commissioners of the proper county shall allow, not less than four hundred dollars a year; but the salary of such district attorneys shall not be diminished during the term for which they shall be elected or appointed."

It appears from the proof and from the findings of fact that the term of office of the plaintiff (appellant) began January 3, 1887, and that the action of the said board of county commissioners appealed from, seeking to diminish the annual salary of the district attorney, was had and taken during the term of office for which the plaintiff (appellant) had been elected as district attorney, and after said term had begun, and also after he had qualified for the office, and, in the law, entered upon its duties. This action was in clear violation of the plain provisions of law contained in the amendment above referred to.

There is a distinction between the office and the person holding the office.

The salary, when fixed or allowed, relates and attaches to the office itself, and also to the individual officer, in so far as that the person who for the time being holds the office is entitled to receive the salary of the office.

When the board once fixed the salary "of the district attorney" "at \$700 per annum," it remained as fixed for the full term, and until changed as provided by law, no matter what person held or occupied the office; and the law says the salary of the dis-

trict attorneys shall not be diminished during the term for which they shall be elected or appointed.

The contention of the attorney of respondent, that the board did not *diminish*, but *fixed*, the salary, has no real existence, and is not even the well-defined ghost of a respectable technicality. If they fixed or allowed the salary at a less sum than the salary then existing, they diminished it.

Neither is there any distinction in this case between the word "allow," appearing in said amendment, and the word "fix," as used in the wording of the motion or resolution of the board constituting the action appealed from. When the board "allow" the salary they "fix" it—it is fixed; and when they "fix" it, it is allowed—they allow it.

The further contention of the attorney for respondent, that "when one term expires another term begins at the same instant," and that the proposition "that the board cannot then fix any salary that would be a diminution of the salary before fixed, leads to the absurd conclusion that it must at some prior session allow the salary in *futuro*," raises no question that this court will consider in this case. We are to pass upon what was done, and not to determine what might have been done. Neither are we to decide whether or not, under existing law, the salary of district attorneys, when once allowed, can be diminished. It is sufficient for the purposes of this case that the effort to diminish the salary in this instance was illegal; and the error consisted in holding it legal, and no valid judgment could be based or rendered upon such holding.

The board of county commissioners had no power or authority to diminish the salary of the office of district attorney after the term of office for which the plaintiff (appellant) was elected had begun; that is, during the term. Their action was illegal, and the district court should have so found and declared, and judgment should have been rendered accordingly.

The judgment of the district court is reversed.

All the justices concurring, except PALMER, J., dissenting, and THOMAS, J., not sitting.

FRANZ FALK BREWING Co., Appellant, v. MIELENZ BROS., Respondents.

1. Appeal—Assignment of Error.

An assignment, "the court erred in admitting evidence at the trial against the objection and exception of the appellant," is improper for not stating in what the error consisted, or pointing out the evidence, the admission of which it is claimed was error.

2. Same.

An assignment, "the court erred at the trial in excluding evidence offered by appellant, and to the exclusion of which appellant duly excepted," is improper as not pointing out what evidence was excluded, to the exclusion of which it is claimed there was error.

3. How to Assign Error.

It is not only necessary to allege error on the part of the court in doing the act complained of, but there must be some ground stated as the basis of the allegation, and it must be specifically and definitely set forth in the assignment, so as to show in what way an error was committed.

4. Assignment of Error Defined.

An assignment of error means the marking or pointing out of the error.

5. Review—Error not Relied on.

An assignment of error will not be considered that was not relied upon or mentioned by the appellant in his argument before the court.

6. Assignment of Error—Disapproval.

An assignment, "the court erred in overruling and denying appellant's motion to set aside the verdict and for a new trial," disapproved. It is not such an assignment as the court is bound to notice.

7. Review—Sufficiency of Evidence.

To determine whether or not a verdict is sustained by the evidence, this court, from the province of the jury, will not speculate or inquire how it would have viewed or acted upon the evidence. The only question to be answered is, is there any legal evidence upon which the conclusions embraced in it can be fairly reached? If there is, in a case where the evidence is conflicting, the verdict will not be disturbed; if there is not, it will be set aside.

(Submitted May 12, 1887; affirmed May 26; opinion filed February 23, 1888.)

Appeal from the district court of Davison county; Hon. BARTLETT TRIPP, Judge.

The action was for the price of certain beer the plaintiff had sold to A. W. and F. W. Mielenz, partners. The defense was that the beer was not what it was warranted to be. A counter-claim was also interposed on the same ground, as appears by the opinion. The plaintiff denied the matters set up in the counter-claim. There was a verdict in favor of the defendants. Plaintiff appealed. There was a conflict in the evidence, and from the rule adopted by the court in such cases, and the fact that the evidence (held sufficient to support the verdict) is voluminous, the reporter has not deemed it of sufficient practical utility to publish it.

E. Whittlesey, (A. J. Edgerton, of counsel,) for appellant.

Subdivision 6, § 286, C. C. Pro., grants a new trial where the evidence is insufficient to justify the verdict, and the verdict is contrary to law.

In the case at bar the evidence is insufficient to support the verdict, and is contrary to law.

If there is any evidence upon which to base the verdict, it is very slight, and the verdict is manifestly and palpably against the weight of evidence.

The evidence is conflicting. *Coleman v. Meade*, 13 Bush, 358; *Wylie v. Marine Bank*, 61 N. Y. 415; *Schwartz v. Yearley*, 31 Md. 270; *McGavock v. Woodlief*, 20 How. 221; *Middleton v. Findler*, 22 Cal. 76.

The granting of a new trial upon the ground that the verdict is contrary to the evidence, it is true, is within the discretion of the court. Notwithstanding, when it is made apparent to the court that a new trial should be granted, it will be ordered, though it has been refused by the court below. *Byington v. Woodard*, 9 Ia. 360; *Huntingdon v. Howe*, 15 Ia. 606; *Martin v. Orndorff*, 20 Ia. 217; *McAunick v. Mississippi & M. R. R. Co.*, 20 Ia. 338.

While an appellate court will cautiously and even reluctantly interfere with a ruling of an inferior court, refusing to set aside

a verdict on the ground that it conflicts with the evidence, yet, if it clearly so appears, such ruling must be reversed. *State v. Tomlinson*, 11 Ia. 401; *McAunick v. M. & M. R. R. Co.*, 20 Ia. 338; *Brown v. Mullin*, 3 Pac. Rep. 99; *Fawcett v. Woods*, 5 Ia. 400; *Northern Pac. R. R. Co. v. Shimmel*, 9 Pac. R. 889; *Hoffman v. Bosch*, 4 Pac. Rep. 703; *Jourdan v. Reed*, 1 Ia. 135; 27 N. W. Rep. 276; 28 N. W. Rep. 922, 634; *Halpin v. Third Avenue R. Co.*, 8 Jones & S. 175; *Allgro v. Duncan*, 24 How. 210; 39 N. Y. 313; 29 N. Y. Rep. 755; *St. Louis & S. F. Ry. v. Bashman*, 1 S. W. Rep. 555.

Dillon & Preston, for respondents.

Appellant in its brief does not claim any error under the first two assignments, hence they cannot be considered by this court.

The third assignment presents but a single alleged error. It is based solely on the ground that the evidence will not support the verdict.

It has been repeatedly held that, where there is a conflict of evidence, a failure to ask the court to direct a verdict is an admission that there is sufficient evidence to go to the jury, and the party so failing is precluded from moving to set aside the verdict as against the evidence. Baylies, *New Trials & Appeals*, 503.

Where a motion for a new trial upon the ground of insufficiency of evidence has been denied, the court, on appeal, will not attempt a critical examination of the evidence, with a view to seeing whether the judge has correctly disposed of the motion. *Id.* 504.

A motion for a new trial is addressed to the discretion of the trial court, and its decision is final, unless it is clearly and manifestly wrong. There must have been an abuse of discretion. *Sang v. Beers*, 30 N. W. Rep. 258; *Faulkner v. Klamp*, 20 N. W. Rep. 220; *Conklin v. City of Dubuque*, 6 N. W. Rep. 894; *Gutierrez v. Brinkerhoff*, 1 Pac. Rep. 482.

Aside from these rules, an examination shows that the verdict in this case is fully sustained by the evidence.

FRANCIS, J. This action comes up on appeal from the judgment of the district court in and for the county of Davidson, territory of Dakota, on exceptions to the verdict of the jury, and on the judgment of the court denying a motion to set aside the verdict and grant a new trial, and three errors assigned. The action was originally brought to recover \$660 for goods, wares, and merchandise sold and delivered by the plaintiff to the defendants.

The defendants answered, admitting that they ordered and received the goods, wares, and merchandise mentioned in the complaint, namely, certain beer.

Defendants further allege that on or about March 5, 1884, they made a contract with the plaintiff, whereby it agreed to sell and deliver beer to the defendants, at Mitchell, Dak., when ordered by defendants, which plaintiff agreed should, when received at Mitchell, be good and salable, and as good as the Joseph Schlitz Brewing Company beer, or better, and for which the defendants promised to pay the plaintiff \$6.40 per barrel; and that by said contract the defendants were to pay freight on the beer when they received it, and the plaintiff was to procure and purchase for the defendant A. W. Mielenz a thousand-mile ticket on the Chicago, Milwaukee & St. Paul Railroad, free of charge; that said beer, when received at Mitchell, was not good or salable, and was not as good as the Joseph Schlitz Brewing Company beer; was sour, spoiled, unsalable, and damaged, and not worth the freight paid thereon by the defendants. That the freight paid thereon by the defendants amounted to \$180. That, as soon as defendants ascertained that said beer was not good and salable they notified the plaintiff of that fact, and that they held said beer subject to the plaintiff's orders.

The defendants further allege that for a long time prior to March 5, 1884, they had been doing a wholesale liquor business in the city of Mitchell, Dak., under the name and style of Mielenz Bros.; that as such firm they had a large number of customers who were receiving their supplies from defendants; and that, being desirous of purchasing said beer for the purpose of

selling the same in job lots to their said customers, they did, on or about March 5, 1884, make a contract with the plaintiff, whereby it was agreed by and between the plaintiff and defendants that the plaintiff should ship and deliver to the defendants certain beer at \$6.40 per barrel, said defendants to pay freight on all beer received, said beer to be good and salable beer, and to be as good as Joseph Schlitz Brewing Company beer, and that said beer should be good and salable beer when received at Mitchell.

That the defendants, relying upon said contract and representations, ordered, under said contract, a car-load of said beer, and on or about July 10th, ordered a second car-load of said beer, under the terms of said contract. That they received the beer so ordered shortly afterwards, and paid the sum of \$180 freight upon the same, and sold the same to their said customers in the towns on the line of roads near the town of Mitchell.

That said defendants were at large expense shipping said beer to their customers, and that said beer was returned by their said customers to these defendants on account of its being sour, spoiled, and worthless, and these defendants were compelled and did pay in freight large sums of money, amounting to the sum of \$50, in the shipping and returning of said beer, making in all the sum of \$230 paid in freight, besides the sum of \$10 for drayage.

Defendants then aver that said beer was not good or salable beer, nor was it as good as Joseph Schlitz Brewing Company's beer, and that the same was sour and spoiled, and that, as soon as the defendants ascertained that said beer was spoiled and sour, they notified the plaintiff to that effect, and that said beer was held subject to plaintiff's order.

The defendants further allege that the plaintiff failed and refused to furnish the defendants with good beer, and that, by reason of the spoiled condition of said beer, they had been damaged in their trade in the sum of \$100, and damaged by reason of the payment of freight and drayage \$380 in addition, no part of which has been paid.

Wherefore the defendants demand judgment against the plaintiff in the sum of \$330, and for costs.

Plaintiff replied to the defendant's counter-claim, admitting that the defendants were a firm doing business at Mitchell under the firm name and style of Mielenz Bros., and denying any knowledge or information of the other allegations of said counter-claim.

The case was tried to the court and jury, and, March 26, 1886, the jury rendered the following verdict: "We, the jury, find for the defendants, and assess their damages at one cent."

March 26, 1886, the plaintiff moved for a new trial upon the following grounds: "That the verdict is contrary to the law and evidence introduced upon the trial of said case, and that the evidence will not support the verdict." April 2, 1886, the court denied said motion, and refused a new trial.

April 19, 1886, judgment was entered in said action that the defendants recover of the plaintiff the sum of \$68.16, damages and costs.

December 11, 1886, the plaintiff perfected its appeal to this court. The errors assigned are as follows:

"The appellant herein says there is manifest error on the face of the record, in this:

"1. The court erred in admitting evidence at the trial, against the objection and exception of the appellant.

"2. The court erred at the trial in excluding evidence offered by appellant, and to the exclusion of which appellant duly excepted.

"3. The court erred in overruling and denying appellant's motion to set aside the verdict and for a new trial."

Neither of these assignments of error is properly made. They allege the commission of error, but do not state what the error consisted in.

The first assignment fails to point out or refer to the evidence admitted, the admission of which is claimed as error.

The second assignment equally fails to point out or designate

what evidence was offered or excluded, the exclusion of which was relied upon as error.

The third and last assignment asserts that "the court erred in overruling and denying appellant's motion to set aside the verdict, and for a new trial;" but fails to call the attention of the court to anything relied upon as the ground of said assignment of error, or to state how or in what particular the act of the court in overruling and denying the motion to set aside the verdict, and for a new trial, was erroneous.

As said by this court in *McCormack v. Phillips*, 34 N. W. Rep. 62: "Counsel must specifically assign the error, and, in the assignment, so designate what is complained of as error as to put the finger of the court upon it." See, also, *Caulfield v. Bogle*, 2 Dak. 464, 11 N. W. Rep. 511; *Bush v. Railroad Co.*, 3 Dak. 445, 22 N.W. Rep. 508; and rule 16 of this court.

It is not only necessary to allege or assert error on the part of the court in doing the act complained of, but there must be some ground alleged as the basis of the assignment that the act was erroneous, and it must be specifically and definitely declared or set forth in the assignment, and as part of it, how, why, in what way, on what ground, or for what reason, an error was committed or exists, or is claimed to exist.

The very meaning of the word "assign" is "to mark out," "to allot," "to apportion," "to make over,"—and there can be no assignment unless it discloses and designates what is marked out, or allotted, or apportioned, or made over.

An assignment of error actually means the marking or pointing out of the error.

But the first and second assignments of error would not now be considered, even had the errors been properly pointed out, as they were not relied upon nor mentioned in the argument of the appellant's counsel before this court.

This leaves the third and last assignment of error, which is, of itself, open to the objection that it is not such an assignment as this court is bound to notice; or as it will, generally, consider.

We will, however, for the purposes of this action, take and consider, in connection with said intended assignment of error, (and as though they formed a part thereof, and were stated as the grounds of the error,) the 11 specified particulars in which the evidence was alleged to be insufficient to sustain the verdict, which particulars were stated orally on the hearing of the motion for a new trial, and were subsequently reduced to writing, and allowed and settled by the district court as a bill of exceptions, and made a part of the record in the action, as follows:

"1. The evidence was insufficient to sustain the verdict in so far as the verdict finds the damages at one cent.

"2. In so far as the verdict finds that the plaintiff warranted the beer, for the price of which this action was brought, to be equal or better in quality than that of the Schlitz Brewing Company, or that plaintiff warranted the same in any particular.

"3. In so far as it finds the excess of the value which the beer in question would have had if the alleged warranty had been complied with, over its actual value, to be equal to the purchase price by the defendants agreed to be paid therefor.

"4. In so far as the verdict finds said excess, together with the damages claimed to have been sustained by defendants in consequence of a breach of the alleged warranty, to be equal to the agreed price of said beer and the price of the said mileage ticket mentioned in the complaint, or equal to the agreed price of said beer alone.

"5. In so far as it finds that the plaintiff agreed to furnish said mileage ticket to defendants free of charge.

"6. In so far as it finds that the damages claimed to have been sustained by the defendants, in consequence of the alleged breach of the alleged warranty by plaintiff of said beer, equaled the price of said beer and mileage ticket.

"7. In so far as the verdict finds that one Patek, as the alleged agent of the plaintiff, warranted said beer as to quality.

"8. In so far as the verdict finds that Patek, as such agent, had actual or apparent authority to warrant said beer.

"9. In so far as it finds that plaintiff warranted the quality

of said beer when the same should arrive at Mitchell, or until sold by defendant.

"10. In so far as it finds that said beer was not sound and merchantable when delivered on board the cars in Milwaukee."

"11. In so far as it finds that said beer was not properly packed and shipped at Milwaukee, the place of shipment and delivery."

On reading the evidence and testimony offered in the trial in the district court, as set forth in the abstract, we find that the jury might have arrived at, therefrom, the very findings stated in said 11 specified particulars, and that the said evidence and testimony warranted the verdict rendered, and was therefore sufficient to sustain it, and all the said "findings" alleged to have been included in it.

In considering the verdict of a jury in any particular case, to determine whether or not it is sustained by the evidence, we are not to speculate or query how we would have viewed the evidence and testimony, or what verdict we would have rendered, had we been of the jury. The real and only question to be solved and answered is, is there any legal evidence upon which the verdict can properly be based, and the conclusions embraced in and covered by it be fairly reached?

It is the province of the jury to weigh and pass upon the evidence, to reconcile conflicting testimony, to determine the truth or value of evidence, to ascertain and declare, from all of the evidence and testimony, the facts of the case, and from the facts, when ascertained by them, and the law, as given to them by the court, to arrive at and announce their decision, which is their verdict; and we cannot determine what specific evidence they relied upon in reaching that verdict, nor how they reconciled or adjusted conflicting evidence or testimony, nor just what they rejected or doubted, nor the precise weight or effect they gave to any particular bit or item of evidence or testimony; nor can we take to ourselves and use the intellectual eye, or the judgment, will, or conscience of each or any individual juror.

This court will, as a general rule, only ask and determine, is.

there any legal evidence or testimony which fairly warrants the verdict of the jury? If there is, particularly in a case where the evidence is conflicting, the verdict will not be disturbed; and, if there is not, it will be set aside. The rule as to the setting aside of verdicts has already been laid down by this court in *Caulfield v. Bogle*, 2 Dak. 464, 11 N. W. Rep. 511, and *Finnery v. Railroad Co.*, 3 Dak. 270, 16 N. W. Rep. 500.

The district court did not err in overruling and denying appellant's motion to set aside the verdict and for a new trial. The judgment of the district court is affirmed.

All the justices concurring.

5	145
5	429
37*	733
41*	742

PIERRE WATER-WORKS Co., Appellant, v. HUGHES COUNTY, Respondent.

1. Appeal—Taxation—Equalization.

Under section 46, c. 21, Pol. C., allowing appeals to the district court "from all decisions of the board of county commissioners," an appeal will lie from the decision of such board, though sitting as a board of equalization under section 28, c. 28, Pol. C., providing that "the board of county commissioners of each county shall constitute a board of equalization," etc.

2. Same—Appealable Decision.

The decision of a board of county commissioners in refusing to reduce an assessment is sufficiently judicial in its character to sustain an appeal under section 46, c. 21, Pol. C., allowing appeals to the district court "from all decisions of the board of county commissioners."

(Argued May 18, 1887; reversed May 26; opinion filed February 24, 1888.)

Appeal from the district court of Hughes county; Hon. L. K. CHURCH, Judge.

C. E. De Land and H. R. Horner, for appellant.

The statutes create but one county board,—the board of county commissioners.

Section 29, c. 21, Pol. C., contains the general grant of
v.5DAK.—10

power to them. It gives them power to "equalize the assessment roll of their county, in the manner provided by law."

It will be noted that in this provision the grant of power to perform is ample and complete, but the manner of the performance is not specified, further than that it is to be done "in the manner provided by law."

The power to act upon the subject of revenue and the assessment of property and the equalization of assessments is as plainly and completely conferred as any other power found enumerated in that section. Indeed, this very subject of revenue and equalization of assessments stands out in prominence among the other powers specified. There is nothing left undone in the matter of the power to equalize, as therein provided; and we submit that it is clear, beyond dispute, that this power is conferred upon the board of county commissioners.

We come now to the consideration of section 28, c. 28, which more particularly prescribes the duty of equalizing and correcting the assessment roll:

"The board of county commissioners of each county shall constitute a board of equalization for the county." Wherein does the above provision differ from a provision in substance as follows: The board of county commissioners shall perform the duties of equalizing for the county? An examination of the legislation of the territory with reference to revenue establishes our contention, that the legislature has created but the one board,—that of county commissioners.

We also find from the former laws that the board of county commissioners was, from the beginning, the only county board known to the law; that the power to equalize was vested in, and the correlative duty imposed upon, that board; and that the term "board of 'equalization'" was used to indicate the nature of certain duties imposed upon that board, to be exercised at certain times.

The record of the commissioners in this case is a virtual admission of our position. It shows them sitting as a board of county commissioners. That is the effect of the language used.

The district court has jurisdiction upon appeal from the action and decision of the county board in placing a valuation upon property for taxation. Section 29, C. C. Pro., defines the appellate jurisdiction of the district court. For the sufficiency of the terms therein used to include this appeal, see section 228, C. C. Pro.; "Decision," 1 Bouv. Law Dict. 438; 1 Abb. Law Dict. 351; *Hanna v. Commissioners Putnam Co.*, 29 Ind. 170.

These boards are inferior tribunals, we submit, within the meaning of that section, and invested with judicial functions. High, Ex. Rem. 346; *Jermaine v. Waggoner*, 1 Hill, 297.

And when performing the duties of equalizing assessments and levying taxes, such boards are likewise acting judicially. *Eaton v. Calendar*, 11 Wend. 89; Cooley, Taxation, 422; High, Ex. Rem. § 141; Desty, Taxation, 498; *People v. Goldtree*, 44 Cal. 323.

By section 46, c. 21, Pol. C., an appeal is given from all decisions of the county board, to any person aggrieved, upon matters properly before it.

The case at bar presents a grievance for which a remedy by appeal should exist, in accordance with general principles of law.

Judge Cooley, in his work on Taxation, pp. 746, 747, enumerates, as among the wrongs of which one may complain in tax cases: "The laying upon him of an excessive or partial assessment," "the laying of the tax on some erroneous and inadmissible principle," and "the failure to obey the law in the proceedings, to the injury of the party's rights." And on the next page, (748,) the same author, in stating instances in which, under some laws, application for abatement of the assessment is the sole remedy, is careful to add that the case must be one "where no principle of law is violated in making it." See, also, Desty, Taxation, 87, 624, 625.

C. J. Crawford, for respondent.

Counsel have reviewed the entire history of our legislation to establish their proposition that "the statutes create but one county board,—the board of county commissioners."

We admit much that is claimed. but contend—

1. That the record of the proceedings of the county board of equalization is not the record of the proceedings of the board of county commissioners as such.

2. That the county clerk may certify to the record of the county board of equalization as such, and such certified copy is competent evidence; *aliter* the original is the evidence, and there is no consequent failure of proof or record.

3. That the sessions of the county commissioners as such are not the only sessions the county clerk must attend, and the record of their proceedings as such are not the only record he is required to keep.

Our legislature has very wisely protected the public from unnecessary expense in numerous cases, by creating different boards out of the same component membership, and providing that the meetings of each board may, as nearly as possible, be held at the same time and place.

In many instances the duties of the several boards, composed of the same members, and constituted the same, are widely divergent, and wholly unlike.

It does not follow by any means that when the membership is identical there is but one board.

In law, one person may be a parent, a husband, an heir, a guardian, a partner, a beneficiary, an executor, an administrator, and an assignee, and in each capacity his standing in a court as a party plaintiff or defendant rests entirely upon his peculiar relations to that case and the issues involved therein.

Corporations, partnerships, and official boards are marked in their aggregate and organized existence by a distinct individuality, which does not depend upon the character of their component parts when segregated, but upon the legal existence and legal character of the body itself, the unit, when organized as such.

Now, if the board of equalization is the same board as the board of county commissioners, why should it have "a formal

existence" thus created? Why should a board of equalization be "made up" or "composed" at all?

If there is but one board, why should it be necessary for the statute to provide that the county clerk of the county shall be the clerk of said board of equalization for the county? If the board of equalization is not a distinct tribunal, it was not necessary to thus specially provide for it a clerk.

If it is not a distinct board, why did not section 30, c. 21, Pol. C., so frequently cited by opposing counsel, and which prescribes the specific duties of the board of county commissioners at its meeting on the first Monday in July, also include and mention the duty of "equalizing and correcting the assessment roll," and provide that it shall then perform that duty? Why was this latter duty specified as the peculiar and special duty of the board of equalization at its only meeting in July of each year? Section 29, c. 28, Pol. C. See, also, sections 8, 10, 19, c. 28, Pol. C.

But counsel insist that the board of county commissioners has power "to equalize the assessment roll of their county" under the power guarantied in section 29, c. 21, Pol. C. But how have they that power?—"in the manner provided by law."

What does this language mean? It cannot in any sense be construed to mean that the board of county commissioners as such has the exclusive power to equalize the assessment roll, because sections 28, 29, c. 28, Pol. C., expressly confer such power upon, and makes the exercise thereof the peculiar duty of, the board of equalization.

The language of section 29, c. 21, Pol. C., referring to the county commissioners, is: "They shall have power," etc. It does not say the board shall have power," but they—the commissioners—shall have power to equalize the assessment roll in the manner provided by law.

We take it that the word "they," as here used, refers, not to the board of county commissioners, but to the members thereof, who shall exercise the power conferred "in the manner provided by law;" sometimes acting as a board of health, sometimes as

a board of county commissioners, and, in the matter of equalizing the assessment roll, acting as the board of equalization.

So, in this territory, it is no unusual thing for the court to sit, at the same term, now as the court to determine United States cases, and now as the court for the determination of territorial cases.

The right to appeal given by statute from an order of the board of commissioners does not imply the right of appeal from orders of the board of equalization. *General Custer Min. Co. v. Van Camp*, 3 Pac. Rep. 22; *Gillette v. Treasurer Lyon County*, 1 Pac. Rep. 577.

No appeal lies in this case. Boards of county commissioners have no judicial function, power, or authority. Their "decisions" are not judicial determinations. *Rupert v. Board of County Com'rs*, 2 Pac. Rep. 718. Section 1907, Organic Act. *Hedgers v. Commissioners of Lewis and Clark Cos.*, 1 Pac. Rep. 742. "From all decisions * * * upon matters properly before them" is without any force or effect under the organic law, because the "legislature cannot confer on one court the functions and powers which the constitution has given to another, when that jurisdiction is exclusive. *Cartwright v. Bear River & Aul. Watch Co.*, 30 Cal. 580.

The "decision" appealed from must be a *judicial* decision to give the district court jurisdiction, and the board cannot render a *judicial* decision. *Fulkerson v. Stevens*, 1 Pac. Rep. 261.

TRIPP, C. J. This case comes to this court on appeal from the order of the district court in and for Hughes county, dismissing an appeal from the decision of the board of county commissioners of that county, sitting as a board of equalization in the matter of the assessment of plaintiff's property for taxes. The board of county commissioners of Hughes county met at the county-seat on the first Monday of July, 1886, as provided by statute, and convened as a board of equalization, and adjourned to July 14, 1886. Upon the last-named day, said commissioners, as a board of equalization, proceeded to equalize

the tax assessment of that year, and, among others, they raised and fixed the assessment of this plaintiff at \$20,000. To this action of the board the plaintiff demurred, and claimed that the value of said property was not greater than \$2,100, and that it should be equalized and assessed at that sum, and no more; and from the decision of the board fixing the assessment at \$20,000, and declining to reduce the sum, the plaintiff took an appeal to the district court of Hughes county. The appeal coming on to be heard in the district court, the respondent moved to dismiss, upon the ground that the decision appealed from was a decision of the board of equalization, and not a decision of the board of county commissioners, and that no appeal lay therefrom to the district court. The court sustained this position of respondent, and dismissed the appeal for want of jurisdiction, from which order an appeal has been taken to this court; and the question presented is, does an appeal lie from the decisions of the board of equalization to the district court in matters of assessment? And this presents two questions for our determination:

1. Is the decision of the board of equalization a decision of the board of county commissioners?

2. If so, is the decision in this case such a decision, within the meaning of the statute, as may be appealed from?

As to the first question presented, it is conceded by appellant that there is no statute giving an appeal from the board of equalization as such, and that, an appeal being purely a statutory remedy, unless the appeal is authorized by the statute allowing an appeal from "all decisions of the board of county commissioners upon matters properly before them," (Pol. Code, c. 21, § 46,) the district court was without jurisdiction, and its judgment must be affirmed.

The court below held that the board of equalization was a board separate and distinct from the board of county commissioners, and that, while it was composed of the same individuals, its powers and duties were separate and distinct, and that its decisions and determinations, if reviewable at all, were

not reviewable upon appeal. The question, while an important one to the tax-payer as well as to the profession, is purely a statutory one, and its determination depends entirely upon the construction to be given the statute creating and constituting the board of equalization. The position of respondent, that the distinctness and independence of these tribunals does not depend upon the fact whether they are composed of the same or different individuals, and that such fact established would not "unify the functions or powers of the two," is undoubtedly correct. It is no unusual thing that the same person holds separate and distinct offices, with separate and distinct powers, and that his acts and decisions while exercising the one office are wholly independent of his acts and decisions done and made while exercising the other. A slight change in the phraseology of the statute which permits or authorizes the same person to exercise different functions of the same office, or to fill separate offices at the same time, may make his acts separate and independent of each other,—the acts of different officers,—or may make them all the acts of one officer exercising different powers and jurisdictions. The legislature may confer the duties of several officers upon one, or may subdivide the duties of any office, and confer such duties upon different officers, or create separate and distinct offices for each class of duties, as it may see fit. There are no inherent duties appertaining to any office which may not be changed at the will of the legislative body. It may provide that the probate judge shall perform the duties of county treasurer, and that the register of deeds shall be clerk of the county board, as appears from the early legislation of this territory, and it may do this by providing that such officer may exercise such duties *ex officio*, or it may require such duties to be performed by him in his one official capacity, where not restrained by some constitutional provision or organic law.

The court must therefore look to the wording and phraseology of the statute in each particular case in determining whether the legislature intended to create two offices, each to be exercised separately by the same individual, or whether it intended

to impose upon one officer the additional duties of another office. This court held in *County v. Simonsen*, 1 Dak. 403, where Simonsen had given bond "to well and faithfully and impartially perform the duties and execute the office of probate judge," and had never given any bond as treasurer of the county, that he was held on such bond for his default as treasurer; the statute at that time making the judge of probate the treasurer *ex officio* of the county. This was upon the principle just enunciated, that, notwithstanding the statute recognized the office of treasurer as a distinct one by using the words "*ex officio*," yet the effect of all the statutes, when considered together, was to impose upon the probate judge the duties of treasurer, and that, therefore, a default in those duties was a default in his duties as probate judge. The question, then, recurs, did the legislature intend to create a separate and distinct tribunal of the board of equalization, or did it intend to confer the duties of the board of equalization upon the board of county commissioners? The general powers of the board of county commissioners are enumerated in the statute of this territory as follows:

"Sec. 29. They shall have power to make all orders respecting property of the county, to sell the public grounds of the county, and to purchase other grounds in lieu thereof. * * *

"2. They shall have power to levy a tax not exceeding the amount now authorized by law, and to liquidate indebtedness.

"3. To audit the accounts of all officers having the care, management, collection, or disbursement of any money belonging to the county, or appropriated for its benefit.

"4. To construct and repair bridges, and to open, lay out, vacate, and change highways; to establish election precincts in their county, and appoint the judges of election, and to equalize the assessment roll of their county, in the manner provided by law.

"5. To furnish the necessary blank-books, blanks, and stationery for clerks of the district court, county clerk, register of deeds, county treasurer, and probate judge of their respective

counties, to be paid out of the county treasury; also a fire-proof safe, when in their judgment the same shall be deemed advisable, in which to keep all the books, records, vouchers, and papers pertaining to the business of the board.

"6. To do and perform such other duties and acts that boards of county commissioners are now, or may be hereafter, required by law to do and perform." Pol. Code, c. 21.

It will be observed that extensive powers are intrusted to this board,—legislative, administrative, executive, and *quasi* judicial; and among these enumerated powers is the power to "*equalize the assessment roll of the county.*"

At first reading, the statute seems so clear that there is little room for doubt that the duty of equalizing the assessment of taxes is expressly conferred upon the *board of county commissioners*. Shelter for argument against this plain enumeration of the duties of the board is first sought in the words, "in the manner provided by law," and it is contended that other provisions of the statutes which refer to the "board of equalization" have provided a *manner* of exercising this jurisdiction, to-wit, by authorizing the individual commissioners to act as a board of equalization; and, in support of this argument, the attention of the court is called to the fact that the statute granting these powers of the commissioners commences with the words, "they shall have power," etc., instead of, "the board of county commissioners shall have power," etc.; and that the words, "they shall have power to equalize the assessment roll of the county in the manner provided by law," must be taken to mean that the individuals composing the board of county commissioners shall have power, when sitting as a board of equalization, to equalize the assessment roll of the county.

A hasty glance at chapter 21 of the Political Code, prescribing the duties and powers of the county commissioners and other officers of the county, will show that the word "*they*" is constantly used for and in lieu of the "*board*" in nearly every section wherein the duties and powers of the board are enumerated.

Section 18 begins: "The county commissioners shall meet and hold sessions for the transaction of business at the courthouse in their respective counties."

Section 19 reads: "At the first meeting of the county commissioners in each and every year, *they* shall elect one of their number chairman."

Section 21: "When the board of county commissioners are equally divided on any question, *they* shall defer the decision until the next meeting of the board."

Section 23: "The board of county commissioners shall have power to preserve order when sitting as a board, and may punish contempts by fines not exceeding five dollars, or by imprisonment in the county jail not exceeding twenty-four hours. *They* may enforce obedience to all orders made, by attachment or other compulsory process; and, when fines are assessed by *them*, the same may be collected before any justice of the peace having jurisdiction."

Section 24: "The said *commissioners* shall keep a distinct account with the treasurer of the county. * * * *They* shall charge the treasurer with all sums paid him, * * * and *they* shall credit him with all warrants returned and canceled, * * * and the said *board* shall, in *their* settlement with the treasurer, keep the general, special, and road tax separate."

Section 25: "*They* shall keep a book in which all orders and decisions made by *them* shall be recorded, except those relating to roads and bridges." * * *

Section 26: "*They* shall keep a book for the entry of all proceedings and adjudications."

Section 27: "*They* shall keep a book for the entry of warrants on the county treasurer." * * *

Section 28: "*They* shall have power to institute and prosecute civil actions in the name of the county."

Section 30: "*They* shall superintend the fiscal concerns of the county, and secure their management in the best manner. *They* shall keep an account of the receipts and expenditures of the county. * * * *They* shall cause a full and accurate state-

ment of the assessments * * * to be made out, * * * and *they* shall have the same printed."

Section 32: "*They* shall submit to the people of the county * * * any question involving an extraordinary outlay of money."

Section 33: "*When* county warrants are at a depreciated value, the said commissioners may, in like manner, submit the question whether a tax * * * may be levied."

Section 40: "*They* shall hold their sessions with open doors, and transact all business in the most public manner; and where the county has no court-house, or the court-house shall be unfit or inconvenient, *they* may hold their sessions for the transaction of business at any other suitable place at the county-seat. All matters pertaining to the interest of the county shall be heard by the *board* of county commissioners in session only, but *they* may continue any business from any regular session to any intermediate day."

All these powers and duties prescribed by statute, it will be observed, are powers and duties which "*they*" are to exercise and perform, not as individuals, but as a "*board*" of county commissioners in session only."

It will hardly be contended that the other powers and duties enumerated by the statute are to be performed by the commissioners in their individual capacity; that accounts can be audited, highways and bridges laid out or constructed, or the public property of the county be sold or disposed of by the commissioners acting in their individual capacity. Yet the power to equalize the assessment roll is introduced by the same word "*they*," which precedes all the other enumerated powers of the board. Clearly, the word "*they*" is used to designate the commissioners collectively as a board in session.

And the words "in the manner provided by law" cannot be construed to give to the preceding clause the significance contended for by counsel. If the words are to be construed as qualifying the words "and to equalize the assessment roll" only, and not the other powers enumerated in the same subdivision, which is

at least doubtful, they cannot be construed as referring to anything but the method or practice employed in the exercise of the power granted. The words are words of emphasis merely. It would be incumbent upon the commissioners to exercise this, as well as other powers conferred upon them, "in the manner provided by law," without these words; and perhaps their acts, performed in an irregular manner, and not "in the manner provided by law," might be void. But, whatever might be the result of an irregular performance of their other powers and duties, the statute expressly enjoins that in the performance of this duty, and the exercise of this power, they must do it "in the manner provided by law." Can this be construed to mean that this duty shall be done, and that this power, so expressly conferred on the board of county commissioners, may be exercised by another board? When the statute provides that the board of county commissioners "shall equalize the assessment roll in the manner provided by law," does it mean that this board shall transfer this duty to another board? Would that be a performance of its duty "in the manner provided by law?" The statement of the proposition answers the argument. The words "in the manner provided by law" are words of practice, merely requiring the board of county commissioners, in equalizing the assessment roll, to follow the practice and rules of procedure laid down by the statutes and laws of the territory.

Much stress is laid upon the wording of section 28, c. 28, Pol. Code, by respondent's counsel, which reads as follows: "The board of county commissioners of each county shall constitute a board of equalization for the county, and said board, or a majority of the members thereof, shall hold a session of not less than two days at the county-seat, commencing on the first Monday of July in each year, for the purpose of equalizing and correcting the assessment roll of their county; and, in order to equalize and correct such assessment roll, they may change the valuation and assessment of any property, real or personal, upon the roll, by increasing or diminishing the assessed valuation thereof, as shall be reasonable and just, to render taxation uni-

form: provided, that the aggregate assessment shall not be materially changed thereby."

But a careful analysis of this section discloses no such conflict with section 29, c. 21, *supra*, as shows an intention on the part of the legislature to qualify or negative the effect of that section by taking away the powers there conferred upon the county commissioners, and bestowing them upon another separate and distinct board. The section reads: "The board of county commissioners shall constitute the board of equalization." It does not say the individual members of the board of county commissioners shall constitute the board of equalization. If the board of county commissioners constitute the board of equalization, when the board of equalization is constituted, it is the board of county commissioners constituted as a board of equalization. In other words, it is the board of county commissioners exercising additional powers of another jurisdiction, but it is still the board of county commissioners. It is not unlike the jurisdiction of a court of record, upon which a new jurisdiction is conferred, such as probate, equity, or maritime jurisdiction.

It would hardly be contended that, in conferring such new jurisdiction, it would be necessary to provide that the judgment rendered in the exercise of such jurisdiction might be appealed from, the same as other judgments of the court. And it would hardly be denied that the general provis on allowing appeals from all final judgments of the court would be sufficient to bring up a judgment rendered in the exercise of the new jurisdiction conferred. Yet is not that this case, less strongly put? Here is the exercise, not of the new but of the old jurisdiction, as old as any jurisdiction of this tribunal, specially provided for, to be exercised "in the manner provided by law," to-wit, that the county commissioners shall hold a session on the first Monday of July, of not less than two days, for the particular purpose of equalizing the assessment roll, and they may make such changes as are therein provided for. It does not provide that the board shall hold *the* session, but it provides that the "board shall hold

a session," clearly implying that this is not the only session the board is to hold, but that it is a session of the board of county commissioners for this purpose; but as it is the only session of the board for this purpose during the year, if the intention of the legislature was as contended for by respondent, it would have been more consistent to have used the words "its session" or "the sessions" than the indefinite words "a session." And this intention of this legislature is further shown by the fact that in section 18, c. 21, Pol. Code, the legislature has provided for a general session of the board of county commissioners to meet at the same time and place for the transaction of the general public business of the county.

And this answers the argument that, because the equalization is fixed for a specific and certain time, that the tribunal exercising such jurisdiction is another and distinct one. The legislature could have prescribed all the meetings of the board of county commissioners. It has fixed some of their meetings by law, and it could have limited their meetings to those stated times, if it had chosen to do so. It could also, without doubt, have provided when and at what meeting the board should exercise the various powers conferred, and in such case it could perhaps have exercised such powers at no other time; but that would be a feeble argument in favor of the proposition that, because they could exercise certain powers only at stated times, they were a different tribunal from the one exercising their other and more general powers. The prescribing of the time of exercising such jurisdiction is but one way of providing for the "manner" of such exercise, and is within the undoubted exercise of legislative power. The section, then, properly construed, supports, and is not in conflict with, section 29, c. 21, Pol. Code.

That section enumerates the powers of the board of county commissioners, among which is the power of equalizing the assessment roll "in the manner provided by law," and section 28, c. 28, with others, provides the *manner* of exercising such powers, to-wit, the time when the session shall be held, the shortest

length of session, and what changes may be made. It in no way conflicts, but supplements and supports, the former section. Section 30, c. 28, *supra*, which provides that the "county clerk of the county shall be the clerk of such board of equalization for the county," must in like manner be construed not as in conflict with section 28, *supra*, enumerating the powers of the board of commissioners, but it must be construed to mean that the clerk has the same jurisdiction conferred upon him to act as county clerk when the board of county commissioners is exercising its powers as a board of equalization that he has when the board of county commissioners is exercising its other powers or jurisdiction.

This view of the powers of the board of county commissioners is strengthened by an examination of the statutes giving them complete control over the fiscal affairs of the county, and, in addition to statutes already quoted, we may refer to section 4, c. 28, Rev. Codes, where it is provided that "the board of county commissioners of each county shall provide, for the use of the assessor, suitable notices and blank forms for the listing and assessment of all property, and such instructions as shall be needful to secure full and uniform assessment and returns." And again, in section 19, c. 28, *supra*, it is provided that "it shall be the duty of the county commissioners to equalize the valuation of such property in the same manner as of other property; and if the return has not been made by the proper officer at the proper time, as required by this act, it shall be the duty of said county commissioners to add not exceeding fifty per cent. to the valuation thus before them."

These, and other sections, to which reference might be made, clearly show that the legislature intended to give the county commissioners entire supervision over the fiscal affairs of the county. It has given to them power of supervising the assessment, and of "giving to the assessor such instructions as shall be needful to secure full and uniform assessment and returns," and has required the assessment rolls to be returned to the county clerk when extended; and may it not reasonably be im-

plied that it was intended to give them the power of equalization, if any doubt existed in the construction of the enumerated powers expressly conferred upon them by statute?

Our attention is called to the case of *Mining Co. v. Van Camp*, 3 Pac. Rep. 22, decided by the Idaho supreme court, 1884, in which that court holds that an appeal does not lie from the decision of the board of equalization under the general provision for appeal from the decisions of the board of county commissioners. The statute of Idaho under which the decision was made is not set out, but the court makes such reference to the statute that we can see that it is in many respects essentially different from our own. The court says: "In this connection, it is proper to notice that the general meetings of the board of county commissioners are required to be held in January, April, July, and October of each year, at all of which meetings they shall transact any business which may be required of them by law." Id. 24. And the court further quotes from the statute as follows: "The *commissioners* of the county shall constitute a board of equalization, of which the clerk of the board of commissioners shall be clerk." And, after commenting upon the further provision of the statute fixing the date of the meeting of the "board of equalization," and requiring it to remain in session until the "business of equalization presented to them is disposed of," and the fact that the statute "requires them to meet and discharge those duties at a time *not fixed by law* for a meeting of the board of county commissioners," concludes that the board of equalization is a separate and distinct board from the board of county commissioners, and that an appeal will not lie under the general provision of the statute providing for an appeal from that board. It will be observed that the very provisions of the Idaho statute upon which the court relies to deny the appeal are wanting in ours, and the omissions upon which that court places much strength are affirmatively supplied by our statute. The question being, therefore, almost entirely so much a mere legislative intention in the construction of the statute,

the Idaho case may be said to be against rather than in favor of respondent's position.

Our attention is not called to any other adjudications, except *Gillett v. Treasurer*, 1 Pac. Rep. 577, in which Judge BREWER, in determining the case, remarks "that the board of equalization is a distinct tribunal from the board of county commissioners. That it is composed of the same persons is immaterial." But the Kansas statute is not given, nor was that question before the court for adjudication. The only point for determination in that case was whether the board of equalization had the same jurisdiction over personal property that it formerly had over real property.

This brings us to the consideration of the question whether this is a "decision" within the meaning of section 46, c. 21, Pol. Code, and the following section. These sections, or so much of them as apply to the question under discussion, are as follows: Section 46: "From all decisions of the board of commissioners, upon matters properly before them, there shall be allowed an appeal to the district court by any person aggrieved." Section 47: "Said appeal shall be taken within twenty days after the decision of said board, by serving a written notice on one of the board of county commissioners." Section 48: "Said appeal shall be filed by the first day of the district court next after such appeal, and said cause shall stand for trial at such term." Section 49: "All appeals thus taken to the district court shall be docketed as other causes pending therein, and the same shall be heard and determined *de novo*." Section 50: "The district court may make a final judgment, and cause the same to be executed, or may send the same back to the board, with an order how to proceed, and require said board of county commissioners to comply therewith by *mandamus* or attachment as for contempt."

Section 46, *supra*, seems to be very broad in its terms; and, taken literally, would permit an appeal from every decision of the board of county commissioners, whether final, interlocutory, or even preliminary, and whether made upon the merits or in

matters of procedure. There is but one expressed limitation, and that is "upon matters properly before them,"—a limitation which perhaps the law would imply without enactment.

The word "decision" is a very comprehensive term. Webster defines the word "decision" to be "an account or report of a conclusion, especially of a legal adjudication; as a decision of arbitrators, a decision of the supreme court." Taken in its common and most comprehensive meaning, it would give the aggrieved party an appeal from every determination of the board in the construction of the question before them, *provided* only the appellant could show he was aggrieved by the decision. He might claim he was aggrieved by a continuance of the hearing, by a mere postponement of the consideration of his case, or by any preliminary or interlocutory decision or determination by the board before final action upon the merits of the case. It cannot be that the legislature intended to vex and annoy the board and the courts with such appeals; and it becomes at once apparent from this *reductio ad absurdum* conclusion, to which the legal mind at once arrives, that a limitation was intended to be placed upon the words "all decisions" from which appeals can be taken. The powers given to the board of county commissioners, as we have already seen, are very comprehensive, and include, not only those of an administrative and executive character, but those of a legislative and *quasi* judicial character as well. And it may well be questioned whether the legislature, in giving an appeal from the decisions of the board, intended to make the court a board of county commissioners, and on appeal to require it *de novo* to hear and determine matters of a political and administrative character, which appeal directly to the judgment and discretion of the commissioners. Such is not the province of *courts*. Such a new and unusual jurisdiction will not be assumed by the courts upon mere implication of statutes. And if such a jurisdiction, under the constitution, which proceeds upon the theory that the great powers of the government—the legislative, executive, and judicial—shall be separately exercised by the departments in which such power is ex-

pressly lodged, can be exercised at all by the courts, it can be done only under an express provision of the statute, which in terms admits of no other construction. While it may not be necessary, and in the view we take of this case we do not deem it so, to pass upon anything further than the question whether this appeal is from a "decision" within the statute, we have deemed it proper to call attention to consequences that must result from the literal interpretation of the words allowing an appeal from "all decisions" of the board of county commissioners. And it may not be amiss, in this connection, to quote from a very well-considered opinion of the Kansas supreme court, in which the court was asked to review the action of the board of county commissioners in setting off and organizing a new township under the political powers conferred upon them by statute. The statute of Kansas is very similar to our own as to appeals from the board of county commissioners, as appears from the opinion quoted below. The court, in dismissing the appeal taken from the county board, says:

"Now, will an appeal lie from the board of county commissioners to the district court upon every 'decision' made by the board in the exercise of any of its various powers? The plaintiff in error claims that it will, and he makes this claim solely and entirely upon the broad language of section 30 of the act relating to counties and county officers. He says that '*any person who shall be aggrieved by any decision of the board of commissioners may appeal from the decision of such board to the district court;*' and he claims that a decision may be made by the board in the exercise of one power, as well as in the exercise of any other power. Now, this is true. The board must make decisions in the exercise of its legislative powers, as well as in the exercise of its *quasi* judicial powers. And even in the exercise of its discretionary powers, or any of its political powers, it must also make decisions. And, in any single matter that may come before the board, the board may make decisions. Many of such decisions may be preliminary or intermediate; and will the plaintiff in error claim that an

appeal lies from each and every one of such decisions? Suppose that the board in the present case, instead of refusing to grant the petition of the plaintiff in error,^a and the 55 others who signed the same, had simply decided to postpone the matter until the next meeting of the board; and suppose the plaintiff in error had felt aggrieved at such decision,—could he have taken an appeal to the district court? And could he have continued to take appeals from every decision made by the board with reference to the matter? * * * It seems to us there must be a limit somewhere; that the legislature never intended that an appeal should lie from every decision made by the board of county commissioners. Then, what are the limitations upon the privilege of persons to take appeals from the decisions of the board of county commissioners? Now, the district court is simply a *court*, and exercises only *judicial* power. Hence we would suppose that appeals from the board of county commissioners to the district court must be limited to such cases as require the exercise of purely judicial power, and therefore that, when the board of county commissioners exercises political power or legislative power or administrative power or discretionary power or purely ministerial power, no appeal will lie.

“Now, we do not think that the refusal to grant a petition to set off and organize a new township can be said to be the exercise of judicial power; and it can hardly be said that the granting of such a petition would be the exercise of judicial power. There is no provision in the statutes or in the constitution designating who shall be plaintiffs or who shall be defendants in the case, or whether there shall be any plaintiffs or defendants; no provision authorizing pleadings or evidence or trials or judgments; nothing even squinting towards the idea that any action of the board upon a petition to set off and organize a new township is the exercise of judicial power. This is a new question in this court, and therefore we shall refrain from giving definitions, further than is necessary for the decision of the case. We shall simply decide in this case that,

where the board of county commissioners refuses to grant a petition to set off and organize a new township, one of the petitioners has no right to appeal from such refusal to the district court." *Fulkerson v. Stevens*, 1 Pac. Rep. 262, 263.

The court, it will be observed, goes no further in its decision than to hold that it will not entertain appeals from the county board in matters of a political character merely; and upon the question really determined it is in point here, to the extent that it admits that, in matters of a *quasi* judicial character, an appeal lies. If, therefore, we recognize the correctness of the rule announced by the Kansas court, we would have only to inquire whether the matter determined by the county board was of a *quasi* judicial character.

That these determinations of the county board are not judgments, and have none of the binding effects of judicial determination by a court, has already been announced by this court, and that the appeal from such decision is but another method prescribed by the statute for getting into the district court; in other words, that the litigant has the choice between appealing from the decision of the board before whom he was unsuccessful, and commencing a new action by summons, and that in either case the hearing in the district court is *de novo*. *Spencer v. Sully Co.*, 33 N. W. Rep. 97, (determined February term, 1887.)

Judged by this rule, we have no hesitancy in saying that the matter presented to the board of equalization was of a *quasi* judicial character,—one which, in nearly all of the states, is permitted to reach the courts in some shape, and to eventuate in a judgment in some form during the proceedings by which the property of the citizen is taken for indebtedness to the state; and it may not be out of place to remark that this may be the saving clause—provided, perhaps, without studied intention, in the hurry of legislation—that may give to the statute the necessary provision and constitutional guaranty that the citizen shall not be deprived of his property "without due process of law." We have no doubt, then, upon the second proposition involved,

that this is a "decision" of the board from which an appeal lies to the district court of the proper county.

The action of the district court in dismissing the appeal is reversed, and the cause remanded to the lower court to proceed with in accordance with this opinion.

All the justices concur.

MYRICK, Respondent, v. BILL et al., Appellants.

1. Homesteads—What Right Gives the Interest.

Under the homestead law of Dakota, a person in possession of land with an agreement to purchase has an interest in the land to which a homestead right will attach against every one except the owner of the soil.

2. Contract—To Purchase, What Constitutes.

Where M., in possession of land, upon which he had made valuable improvements, writes the owner that he is desirous of purchasing the land, asking the price, and, receiving an answer, replies that the price is satisfactory; that he would forward the money; and asks when the deed would be ready,—*held*, an agreement to purchase.

3. Homestead—Joinder of Wife in Conveyance—Pol. C. c. 38, § 3.

Where the husband alone executed a bill of sale of two buildings,—a dwelling-house that he and his wife used as their home, and a store that he used, in connection with the dwelling, in the prosecution of his ordinary business,—both situated upon a lot, of which he had an agreement to purchase, consisting of less than one acre, *held*, the buildings were a homestead, and under Pol. C. c. 38, § 3. the wife not having concurred in, or signed the bill of sale, it vested no title in the purchaser, and he could not recover in an action of claim and delivery against her.

FRANCIS, J., dissenting.

(Argued May 19, 1887; reversed May 26; opinion filed February 24, 1888.)

Appeal from the district court of Stutsman county; Hon. W. H. FRANCIS, Judge.

Dodge & Camp, for appellants.

Was there a right of homestead in these buildings and the land on which they stood on October 19, 1878, so that the sig-

nature of Miller's wife, or her concurrence in the bill of sale, was necessary to its validity?

The homestead law is construed liberally for the family, and strictly against the creditor and purchaser. Thompson, Homesteads, 3; *Whittle v. Saunders*, 54 Ga. 548, 65 Amer. Dec. 484. These premises, with the buildings in controversy, occupied by Miller and his family as their home, held under a valid contract of purchase and sale, did constitute the homestead of the Miller family, and could not be conveyed without the joint consent of both the husband and wife. Pol. C. c. 38, § 3; *Canfield v. Hard*, 2 Atl. Rep. 136; *Binzel v. Grogan*, 29 N. W. Rep. 895; *Clay v. Richardson*, 13 N. W. Rep. 644; *Moore v. Reaves*, 15 Kan. 150; *Wilder v. Haughey*, 21 Minn. 101; cases cited in 65 Amer. Dec. 487; *Thimes v. Stumpff*, 5 Pac. Rep. 431; *Hogan v. Manners*, 33 Amer. Rep. 199.

The less the estate, the greater the importance of protecting it. *Wilder v. Haughey*, 21 Minn. 101; *Pelan v. De Bevard*, 13 Ia. 53.

One who occupies land under a contract of purchase, as Miller did, has an estate in the land sufficient to maintain the claim of homestead. *Moore v. Reaves*, 15 Kan. 150; *McCabe v. Mazzuchelli*, 13 Wis. 478; *Wilder v. Haughey*, *supra*; *Fyffe v. Beers*, 18 Ia. 4; *Hewitt v. Rankin*, 41 Ia. 35; *Green v. Farrar*, 5 N. W. Rep. 557; Thompson, Homesteads, 170; *Pryor v. Stone*, 70 Amer. Dec. 341, n; *Canfield v. Hard*, *supra*; *Frisby v. Whitney*, 9 Wall. 187.

White & Hewit, for respondent.

On this homestead question in this case the law has been stated by this court already. *Myrick v. Bill*, 17 N. W. Rep. 268.

This case holds, substantially, that a naked possession of the land will not be sufficient as a basis to support the claim of homestead; there must be some estate in the land, or there can be no homestead right in the building.

The parties in possession of these buildings had occupied them as trespassers on the lot in question until the fall of 1878, when

they corresponded with the agents of the owners, asking to purchase the lot; but there was no accepted contract for a conveyance until long after the bill of sale.

SPENCER, J. This was an action of claim and delivery to recover two frame buildings used as a dwelling and store, and claimed by the plaintiff to be his property by virtue of a certain bill of sale alleged to have been executed to him October 19, 1878, by one Harvey C. Miller, the then owner. The defendants deny that plaintiff is the owner, or entitled to the possession, of said buildings, and allege that at the time of the execution of said bill of sale said defendant Rose A. Bill was the wife of said Harvey C. Miller; that said buildings, and the land on which they stood, was the homestead of said defendant and her family at such time; and that she neither signed nor consented to, nor had knowledge of the execution of, such bill of sale. After the close of the evidence upon the trial, certain questions of fact were submitted to the jury, which, with their answers, so far as they are material to the question we propose to consider, are as follows: "*First*. When was the bill of sale in question executed? *Answer*. October 20, 1878. *Second*. Did the defendant Rose A. Bill and her then husband occupy the dwelling in controversy as their home from the spring of 1878 to the spring of 1879? *A*. They did. *Third*. Was the store in controversy used, during the time from the spring of 1878 to the spring of 1879, in direct connection with said dwelling-house, in the prosecution of said Miller's ordinary business? *A*. It was. *Fourth*. Has the defendant Rose A. Bill occupied said premises as her home since the spring of 1879? *A*. She has. *Fifth*. Did said Harvey C. Miller have the correspondence with a representative of the land department of the Northern Pacific R. R. Co., testified to by Mr. Bill in this case? *A*. Yes, he had."

(From this correspondence it appears that in the latter part of September, or early in October, 1878, and before the execution of the bill of sale in controversy, said Miller wrote the agents or commissioners of the land department of the North-

ern Pacific Railroad Company in regard to purchasing lot 1, in block No. 24, upon which the buildings in controversy were located. He received a reply that the lot could be had for \$25. Miller then wrote that he was anxious to obtain the two lots, and would forward the money at any time, and desired to know when they would forward the deed. That the persons representing the railroad company then wrote, assuring him that he could have the lot at that price, and that they would send a man up in a short time to settle for the purchase.)

In the course of the trial, it was admitted by the counsel for the respective parties in open court, and entered in the minutes, "that lots one and two in block twenty-four, being the land upon which said buildings stood, as described in the pleadings, were contiguous lots, and did not exceed one acre in extent, and were within the town plat of the original town of Jamestown, D. T.; that the defendant Rose A. Bill did not sign or consent to the bill of sale in question; that the title to said land was in the Northern Pacific Railroad Company until May 14, 1879, and that said company conveyed said land to Harvey C. Miller by a good and sufficient deed of conveyance on the day last aforesaid; and that both buildings in controversy were situated on lot one in block twenty-four of the original town of Jamestown; and that the defendant Rose A. Bill was in the year 1877, and from that time until May, 1879, the lawful wife of said Harvey C. Miller."

Without stopping to consider the question whether, under the homestead laws of this territory, anything more than actual possession and occupation of the land on which the house is located is necessary, in order to give such occupant a homestead interest therein, as against everybody except the owner of the soil, and assuming that some interest in the soil itself, in addition to such possession, is essential to put the occupant in position to maintain a homestead right, still the admitted facts in this case, and those found by the special verdict of the jury, are ample to satisfy any demands of the law in that regard, and demonstrate conclusively that the defendant Rose A. Bill and

her husband, at the time of the execution of the bill of sale in question, did have a homestead interest in the lands on which the buildings in controversy were located. It has been repeatedly held, and is well settled, that a person in possession of lands under a contract for their purchase has an interest in the land to which a homestead right will attach. *Moore v. Reaves*, 15 Kan. 150; *McCabe v. Mazzuchelli*, 18 Wis. 478; *Wilder v. Haughey*, 21 Minn. 101; *Hewitt v. Rankin*, 41 Iowa, 35.

The jury, by their special finding that Miller had the correspondence testified to by the witness Bill, have, in substance, found as facts that Miller made a bargain with the railroad company for the sale of lot 1 in block 24 to himself at an agreed price. That is to say, they found that Miller wrote to the owner of the land, or person having charge of its sale, informing him that he desired to purchase it, and requested to be informed at what price it might be obtained; that he received an answer stating the price at which he could purchase it, whereupon he wrote him that the price was satisfactory, that he would forward the money at any time, and asking when the deed would be ready. He at this time was in actual possession of these lands, and had made valuable improvements thereon. Can there be any doubt that these facts constitute, in law, an agreement between these parties for the sale and purchase of the lots in question? We think not. The parties to it treated it as a valid agreement, and it was afterwards consummated by the payment of the price stipulated, and the conveyance of the property to Miller. The law of this territory in regard to homesteads provides that the homestead must embrace the house used as a home by the owner thereof, (section 6, c. 38, Pol. Code;) that it may contain one or more lots, with the buildings thereon, (section 7,) if within a town plat not exceeding one acre in extent, (section 8.) It must not embrace more than one dwelling; * * * but a shop, store, or other building situated thereon, and really used or occupied by the owner in the prosecution of ordinary business, may be appurtenant to such homestead. Section 9.

Applying this law to the facts in this case, we conclude that the buildings in controversy did constitute and were a homestead of said Miller and his family at the time of the execution of the bill of sale under which plaintiff claims to recover them.

It is further provided by section 3 of said homestead law that any conveyance or incumbrance by the owner of such homestead shall be of no validity unless the husband and wife, if the owner is married, and both are residents of the territory, concur in and sign the same. Miller was the owner in the sense in which that term is used in this statute, and the defendant Rose A. Bill was his wife at the time the bill of sale was executed, and they both occupied the dwelling on this lot as a residence. She did not concur in or sign the bill of sale, and consequently it vested no right or title to the buildings in controversy in the plaintiff.

We do not consider any of the other questions presented on this appeal. The conclusions of law made by the court below, and on which judgment was entered, were, for the reasons stated, erroneous, and such judgment must therefore be reversed.

All concur, except FRANCIS, J., dissenting.

**THOMPSON, Receiver First Nat. Bank Sioux Falls, Appellant, v.
McKEE, Respondent.**

1. Evidence—Parol to Vary Indorsement—C. C. § 921.

Where M. indorsed a draft, without any words of explanation or limitation, under section 921, C. C., providing that the execution of a contract in writing supersedes all oral negotiations or stipulations that preceded or accompanied it, he will not be permitted to affect his liability as an indorser by showing that he merely identified the party that received the money; that he put his name on the back of the draft at the request of the cashier, who stated he wanted it for the purpose of showing who made the identification, and assured him (M.) he should sustain no liability thereby.

2. Banks and Banking—Authority of President and Cashier.

Where M., who went to a bank to identify W., at the request of the cashier wrote his name on the back of a draft, the cashier assuring

him that he should not be held liable on it, his name being wanted merely to show who identified W. and M. afterwards gave his note to the bank for the amount of the draft it had cashed, with an understanding with the cashier that his liability on the note should not be greater than it was on the draft, and he subsequently renewed this note with a similar understanding with the president and cashier, *held*, in an action by the receiver of the bank on the second note, (1) that M. would not be permitted to vary the terms of his liability as an indorser on the draft by parol; (2) that the facts constituted no defense, for the cashier and president had no authority to make any such contract.

3. Same—Bank Officers—Powers.

The officers of a bank have no power to modify obligations on the faith of which the bank has parted with its funds.

FRANCIS, J., dissenting.

(Argued May 19, 1887; reversed, May 26; opinion filed February 24, 1888.)

Appeal from the district court of Minnehaha county; Hon. C. S. PALMER, Judge.

Coughran & McMartin, for appellant.

On the powers of banks and their officers, see section 5136, R. S. U. S., subsecs. 5, 7; Ball, Nat. Banks, 49; Morse, 107-109.

A cashier has no authority to make any statement to a person about to become an indorser, releasing any liability. Morse, 152-157, 189, and cases cited; Ball, 60-63; *Chemical Nat. Bank v. Kohner*, 58 How. Pr. 267; *Bank of U. S. v. Dunn*, 6 Pet. 51; *Bank of U. S. v. City Bank*, 21 How. 356; *First Nat. Bank of Whitehall v. Tisdale*, 18 Hun, 157; *Bank of Metropolis v. Jones*, 8 Pet. 12; *Davis v. Randall*, 115 Mass. 547; *Hodges v. First Nat. Bk. Richmond*, 22 Gratt. 51; note to *Merchants' Bank v. State Bank*, Thomp. Nat. Bank Cas. 64; *Olney v. Chadsey*, 7 R. I. 224.

The president has no power, unless given it by board of directors, to make any contract in behalf of the bank save only that of employing counsel. Morse, 144-157; *Brouwer v. Appleby*, 1 Sandf. 158; *Bank of Metropolis v. Jones*, 8 Pet. 12; *Spyker v. Spence*, 8 Ala. 333; Ball, 59-62.

An indorser or maker of a negotiable instrument cannot show

by oral evidence against his indorsee that it was agreed that he should not be liable, or that his indorsement was only for purposes of identification. *Daniels, Neg. Ins.* §§ 717-719; *Prescott Bank v. Caverly*, 7 Gray, 217; *Stack v. Beach*, (S. C. Ind. Sept. 1881,) Cent. Law J. Oct., 1881, p. 317; *U. S. v. Dunn*, 6 Pet. 59; *Bank of Metropolis v. Jones*, 8 Pet. 12; *First Nat. Bank v. Tisdale*, 18 Hun, 151; *Davis v. Randall*, 115 Mass. 550; *Thatcher v. West River Banks*, 19 Mich. 196; *Ball, Nat. Banks*, 102; *Brown v. Spafford*, 95 U. S. 474; *Specht v. Howard*, 16 Wall. 564; *Martin v. Cole*, 104 U. S. 30-40; *Parsons, Notes & Bills*, 591; *Cox v. Bank*, 100 U. S. 713; *Forsyth v. Kimball*, 91 U. S. 291; sections 921, 931, C. C.; *Morse*, 149; *Wright v. Morse*, 9 Gray, 337; *Allen v. Farbish*, 4 Gray, 504.

Persons dealing with the bank are presumed to know the extent of the general powers of a cashier. *Farmers v. Mechanics' Bank*, 1 Doug. (Mich.) 457.

The extent of the general powers of the cashier of a bank is a question of law, and not of fact. *Id.*

Bailey & Davis, for respondent.

Two successive notes were given for the amount of the draft, but each was upon the express agreement that the note should not increase the defendant's liability.

Even without this agreement, the question of liability would rest on the original transaction in relation to the draft. If defendant was not liable on that, then there was no consideration for the notes. It was upon this theory that the court submitted the case to the jury. In so doing there was no error. *Hill v. Buckminster*, 5 Pick. 391.

The question then recurs, did the defendant make himself liable as an indorser by placing his name on the draft simply for the purpose of enabling the plaintiff to know who identified Wolfe? If so, it is in direct contradiction of one of the essentials of a contract,—the assent of the parties. The defendant was never a party to the draft.

Under the facts found there was no consideration for a legal

liability on the part of the defendant. The plaintiff parted with nothing on the strength of his signature. It relied in no pecuniary sense upon his name. It did not consider him an indorser. It never made demand, nor gave any notice of protest. His name was placed there for an entirely different purpose.

Want or failure of consideration may always be shown by parol between the original parties. *Burnham v. Allen*, 1 Gray, 496; *Hubbard v. Galusha*, 23 Wis. 398; *Hillsdale College v. Thomas*, 40 Wis. 661.

It was done at the request of plaintiff; not for Wolfe's accommodation. Wolfe did not so even request. He was not an accommodation indorser for Wolfe.

In this respect the case differs materially from the one where a person becomes an indorser with the understanding that he shall not be holden as such. In the latter case the verbal understanding may be said to contradict the written obligation. In this case defendant was not an indorser. It was agreed by both parties that he should not be. Hence the verbal agreement does not contradict the writer, but shows what it was,—explains the transaction.

Parol evidence is admissible between the immediate parties to carry their intention into effect, and show the facts and circumstances of the transaction. *Gerard Bank v. Comley*, 2 Miles, (Pa.) 405; *Dan. Neg. Inst.* §§ 710, 711; *Good v. Martin*, 95 U. S. 95; *Bruce v. Wright*, 3 Hun, 548; *Harrison v. McKim*, 18 Ia. 485; *Skinner v. Church*, 37 Ia. 91; *Davis v. Brown*, 94 U. S. 423-429; *Johnson v. Martinus*, 9 N. J. Law, 144.

If the cashier had authority to solicit the defendant to put his name on the draft, then the representations, conditions, and agreements under which it was done, will bind the principal. *Story*, Ag. 134, 135; *Rinesmith v. Peo. Ft. Ry. Co.*, 90 Pa. St. 262; *McDonough v. Heyman*, 38 Mich. 334.

If he had no authority, and the bank ratified his act, it must ratify the whole transaction as it occurred. *Story*, Ag. 250.

The same may be said in reference to taking of the successive notes.

SPENCER, J. This is an action upon a promissory note bearing date April 21, 1885, executed by the defendant to the order of the First National Bank of Sioux Falls for \$1,000. The plaintiff is the receiver of said bank. The incorporation of the bank, execution and delivery of said note by the defendant, and the appointment of plaintiff as receiver, are admitted by the answer. As matters of defense, it is alleged in the answer, in substance, that the note in suit was given in renewal or to take place of another of like amount, made April 8, 1884, between the same parties; that said last-mentioned note was given for the amount of a draft which plaintiff had cashed in June, 1884, for one Henry Wolfe, and on which said defendant's name appeared as indorser; that said defendant went with said Wolfe to said bank for the purpose of identifying him, and while there, and when Wolfe presented said draft, the cashier asked defendant to indorse it, which he at first declined to do, but upon the cashier's statement to him that he only desired his name for the purpose of showing who identified Wolfe, and that he should not be held liable on said draft if he indorsed it, he did put his name on its back; that the first note was given by said defendant to the bank with the understanding and agreement that defendant's liability thereon should not be greater than it was on said draft, and that in any event he should not be called upon to pay more than \$600 on said note; and that the note in suit was given under similar circumstances, and with a like agreement and understanding between the president and cashier of said bank and the defendant, and in renewal of said first note.

Upon the trial of the action, the plaintiff produced the note in suit, read it in evidence, proved he found it among the assets of the bank when he took possession, that payment of it had been duly demanded of the defendant, and rested his case.

Plaintiff then objected to the admission of any evidence on the part of the defendant, on the ground that the answer did not state facts sufficient to constitute a defense. The objection was overruled, and the plaintiff excepted. The defendant was sworn in his own behalf, and testified, substantially, to the facts

as alleged in the answer. At the close of his testimony the defendant rested, and thereupon the plaintiff moved the court to direct the jury to return a verdict for the plaintiff, upon the ground, among others, that the facts as established by defendant's evidence did not constitute a defense; which motion was also overruled, and the plaintiff excepted. No other evidence was offered by the defendant, and at the close of all the evidence the plaintiff renewed his motion for the direction of a verdict in his favor, upon the grounds heretofore stated; which was again denied, and plaintiff excepted. The case was then submitted to the jury, under instructions from the court, and the jury returned a verdict in favor of the defendant. The plaintiff moved for a new trial, upon the grounds, among others, stated in the motions aforesaid; which motion was denied, and the plaintiff appealed to this court.

1. There is no pretense that there was any ambiguity about the draft, or the indorsement of it by the defendant, which requires evidence to explain its meaning; nor is there any claim that it was indorsed by the defendant through mistake, fraud, or inadvertence. On the contrary, the draft seems to have been in the usual form of such instruments, and was indorsed by the defendant, unaccompanied by any words of explanation or limitation as to his liability thereon. He thereby made a contract with the bank which was absolute and unequivocal on its face, and was to the effect that the draft was genuine, and would be paid upon presentment at the time and place it was by its terms made payable, or that in default thereof he would himself pay it on demand. The allegations of the answer, and the evidence which the defendant was permitted to introduce against plaintiff's objections, are to the effect that he did not make such agreement. The general rule of law that parol evidence is inadmissible to vary, contradict, or explain an agreement which has been reduced to writing is well understood, and has found expression in section 921 of the Civil Code of this territory.

Proof of the facts alleged in the defendant's answer could have no other effect, and could have been offered for no other pur-

pose, than to contradict, vary, and impair the written agreement which the defendant made with the bank when he indorsed the draft. In no other way than by contradicting this agreement could the defendant have established the defense alleged in his answer. The court erred, therefore, in admitting the testimony of the defendant, under plaintiff's objection, to prove such facts, because the tendency, purpose, and effect of such testimony was to contradict, and did in fact contradict, the written agreement of the defendant. A similar question was before the court in the case of *Davis v. Randall*, 115 Mass. 547, where the defendant offered to prove as a defense that he accepted certain drafts, on which the action was brought, for the accommodation of another, and that before they were accepted the president of the bank agreed orally that he should not be called upon to pay the draft; and it was held that proof of such an agreement was incompetent, for the reason that it violated the rule of law that oral evidence was inadmissible to vary or control the terms of a written contract.

This precise question has been the subject of judicial investigation in several cases very analogous to the one at bar, and the decisions have uniformly sustained this view, (*Bank v. Dunn*, 6 Pet. 57; *Bank v. Jones*, 8 Pet. 14;) and the general rule is well established.

2. Another fatal objection to the defendant's position is that; assuming that the facts alleged by him are true, and that evidence in support of them was admissible, still they constitute no defense to his liability on the note in suit, for the reason that the cashier or president of the bank had no right or authority to make any such contract that would bind the bank. Officers of banks are but its agents, and, like other agents, can only bind their principals when acting within the scope of their authority. It is not within the province of a cashier or president of a bank to excuse the obligations of persons liable to it, either as principal debtors or accommodation makers or indorsers without payment.

And it has been repeatedly held by the highest judicial tri-

bunals that officers of banks have not the power to excuse or limit the legal obligations of persons to the banks they represent, by agreeing with them that they shall not be held liable or called upon to pay the obligations which they make, either as principal debtors or accommodation makers or indorsers, and on the credit of which the bank has parted with its funds.

In the case of *Bank v. Dunn*, 6 Pet. 57, it was so held; and in the case of *Bank v. Jones*, 8 Pet. 14, where this question was under consideration, the court made use of this language: "The discharge of the indorser was urged, on the ground that certain statements had been made by the officers of the bank which induced the indorser to sign the paper under a belief that by doing so he incurred no legal responsibility. As the ground already is clear, it is unnecessary to add in this case, as was stated by the court in the *Case of Dunn*, that the officers of the bank had no authority, as agents of the bank, to bind it by the assurances which they gave." The same doctrine was held in the cases of *Bank v. Tisdale*, 84 N. Y. 655, and *Wyman v. Bank*, 14 Mass. 58, and is decisive of the case at bar.

It follows that plaintiff's motion to direct a verdict for the plaintiff should have been granted, and that the court erred in overruling said motion. We are therefore of opinion that said judgment must be reversed, and a new trial ordered.

All concur, except FRANCIS, J., dissenting.

VANTONGEREN, Respondent, v. HEFFERNAN et al., Appellants.**1. Public Lands—Pre-emptioner's Rights before Patent.**

A pre-emptioner of public land, with the usual final receipt, has no such title, prior to the issuance of the patent, as will enable him to maintain an action to quiet title to the land.

2. Same—Jurisdiction of Courts Prior to the Patent.

Under the pre-emption laws of the general government the courts have no jurisdiction, until after the patent has been issued, to pass upon conflicting claims, arising between private parties, involving title to public land.

(Argued February 10, 1888; reversed, and opinion filed, May 8, 1888.)

Appeal from the district court of Grant county; Hon. L. K. CHURCH, Judge.

Mellette & Mellette and J. F. Fisher, for appellant.

The doctrine has been long settled and uniformly upheld that, while the legal title to lands remain in the United States, and proceedings for acquiring this title are yet *in fieri*, the courts will not interfere to control the exercise of the power vested in the land department of the government. All conflicts arising out of these proceedings, and all questions pertaining thereto prior to the issuance of the patent, belong exclusively to that department for adjustment. *U. S. v. Schurz*, 102 U. S. 396; *Forbes v. Driscoll*, 31 N. W. Rep. 633.

R. B. Smither and Geo. W. Hawes, for respondents.

The two cases cited by appellant are not in point. We maintain that the district courts, being possessed of equitable jurisdiction, have original jurisdiction over the subject-matter of all actions arising out of a controversy between individuals involving title to real property or the boundary thereof, except in actions of forcible entry or forcible and unlawful detainer, (section 28, C. C. Pro.,) either before or after patent issues.

The settled doctrine of both state and federal courts is that a purchaser acquires an equitable title when he has completed his part of the contract; and a purchaser of public land, receiving a certificate of purchase or receiver's receipt, acquires an equitable title the same as on a sale by an individual owning the fee. *Brill v. Stiles*, 35 Ill. 305; *Lindsey v. Hawes*, 2 Black, 554; *Arnold v. Chapman*, 2 Ia. 1.

TRIPP, C. J. This is an action in the nature of a suit in equity, brought by the plaintiff, Francis Vantongerren, against the defendants, John Heffernan and Michael Brennan, to quiet title to certain lands situated in the county of Grant, Dak. The action was tried before a referee; and the facts found by the referee show that the plaintiff, Francis Vantongerren, on the 2d day of January, A. D. 1880, entered the S. W. $\frac{1}{4}$ of section 21, township 121, range 47, under the pre-emption law, and that Michael Brennan, defendant, on the 7th day of December, 1880, entered the N. W. $\frac{1}{4}$ of the same section, under the pre-emption law, and that each received, at the time of entry, the usual final receipt, and that the defendant Michael Brennan, on the 13th day of December, 1880, conveyed to the defendant John Heffernan the said N. W. $\frac{1}{4}$ of said section 21 by deed of warranty. These entries and final proofs were made under the survey of the United States in 1865. The referee further finds "that at the time the plaintiff in this action, in the spring of 1879, settled upon and improved the south-west quarter of section 21, township 121, range 47, under the government survey of 1865, there was not visible any section corners or landmarks, showing township, section, quarter lines or corners; that plaintiff, in selecting this quarter section of land, so far as the boundaries of the same are concerned, was governed by the Whetstone creek, and took and settled upon and improved said quarter section with reference to its location north of the Whetstone creek, except the twenty acres south of the Whetstone creek, as in these findings hereinbefore mentioned; also he was governed by the character of the soil, the land lying north of the Whetstone be-

ing of a far better quality than that lying south of the said Whetstone creek." Finding 17.

From the findings it further appears that in the month of September, 1882, the government of the United States caused a resurvey to be made of the township, including these quarter sections in controversy; and by this new survey the east and west quarter section lines between the N. W. and S. W. quarter of said section 21 were removed south about 80 rods; making the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, under the survey of 1865, to become the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 21 under the survey of 1882. That the improvements of the plaintiff, consisting of a house, barn, granary and other buildings, breaking, etc., of the value of about \$700, were made and erected prior to the new survey, and are situated on the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 21 under the survey of 1865, and on the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ under the survey of 1882. There is no finding of the referee as to where the lines of the survey of 1865 were actually run, or where the section and quarter section corners were actually established with reference to this land, further than as shown by the location of these quarter sections upon the plats with reference to Whetstone creek, and other natural objects designated thereon. No patents have ever issued for either of said quarter sections.

The complaint alleges that, by virtue of the premises, he is the owner of said N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 21, under the survey of 1865, now designated as the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 21, under the survey of 1882; that the defendant has entered upon and disturbed his possession, has committed trespass, and threatens to commit trespass, thereon; and prays "that this court decree that plaintiff is the rightful owner of said south half of the north-west quarter of said section, as well as the north half of the south-west quarter of said section; that defendants have no rights or interest therein; that they be required to execute to plaintiff a good and sufficient deed of title to the said south half of the north-west quarter of said section, and that the title to said land be quieted in said plain-

tiff; and that he have judgment against the defendant for the sum of five hundred dollars, in addition to the relief prayed for in his original complaint."

The court confirmed the report of the referee, and thereupon ordered, adjudged, and decreed "that the plaintiff have judgment, as prayed for in his complaint, against the defendant, and each and all of them; that all adverse claims of the defendants, and each of them, and all persons claiming or to claim said premises, or any part thereof, through or under said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless; and that the plaintiff be, and he is hereby, declared and adjudged to be the true and lawful owner of the land described in the complaint, and hereinafter described, and every part and parcel thereof, and that his title hereto adjudged to be quieted against all claims, demands, or pretention of the defendants, or either of them."

The defendant Heffernan appeared, and demurred to the complaint, upon the ground, among others, that the court of equity had no jurisdiction to determine the plaintiff's *title* prior to issue of the patent; and, upon the overruling of his demurrer by the court, and exceptions allowed, he denied the jurisdiction of the court by answer, upon a statement, in allegation of facts, differing from the allegations of the complaint in the essential particular only as to the deviation of the east and west lines of the two surveys; the defendant alleging that the actual survey of 1865 ran its east and west lines between these quarter sections but a few rods only, to-wit, six or eight rods, north of the survey of 1882, and the plaintiff alleging that the deviation was about eighty rods.

After the entry of decree upon the findings of the referee, defendant brings the case to this court, assigning as error that the court below, prior to issue of patent, had no jurisdiction to *quiet title* in the plaintiff, and to determine the *ultimate* rights of the parties, while the *title* remained in the government.

It will be observed that this is not an action to recover the

possession, or to recover damages for disturbing the possession, but it is an action of the plaintiff in possession to forever bar the defendant and his grantees from asserting any title or interest in the land. There is in the complaint a claim for damages for alleged trespass; but this is only incidental and auxiliary to the equitable cause of action set out. Can such a final determination of title be made by the courts prior to issuance of the patent by the government? Under our statute "any person settled upon the public lands belonging to the United States, on which settlement is not expressly prohibited by congress, or some department of the general government, may maintain an action for any injuries done the same, also an action to recover the possession thereof, in the same manner as if he possessed a fee-simple title to said lands." Section 650, Code Civil Proc.

The plaintiff does not seek to recover under this section. He does not seek to recover for disturbance of his possession, but seeks to have a final determination of his title as against the defendants and their grantees, upon the theory that the final certificate issued by the land-officers vested in him a fee of the land which the courts can confirm as against the adverse claims of the defendants.

To maintain this action, the court will be required to hold that the ultimate title of the government passes by the final receipt, subject only to the formal or ministerial act of the department officers in issuing the patent; and that, when the local land officers have once issued a final receipt in cases of pre-emption, the commissioner of the general land-office and the secretary of the interior have no power to recall or cancel the same, but that the patent must issue thereon as of course.

We are led, then, to examine what force and effect is to be given to the final receipt in pre-emption cases; and, to do so intelligently, we will have to note the origin of the law, the changes that have been made therein, and the decisions of the courts rendered from time to time construing the provisions of the original and amended act.

While the pre-emption law may be said to have had its real commencement in 1841, yet, prior thereto, at times, the greed and rapacity of those who were entering large tracts of the public lands became so great that congress had to interfere to protect the actual settler, who had crossed the frontier in advance of the surveys, in the possession of his home and improvements; and these several pre-emption acts, though they differ, as we shall see further on, in many essential particulars, yet their object in the main, was to protect the actual settler in his selection of and his improvements upon the public lands. And while the powers of the different officers have been enlarged or diminished by the various enactments of congress, and these offices have been attached to and made adjuncts of the different departments of the government, yet the office of the commissioner of the general land-office, and the offices of the register and receiver of the local land-office, have remained the same in name from the early history of the government. The act of April 25, 1812, creating the general land-office and the office of commissioner, contained many of the powers, and prescribed many of the duties, that govern and control that office under later laws; and the pre-emption acts of 1830 and 1836, and the intermediate acts, contain many features of the "Pre-emption Act," as it is familiarly known, of 1841. The fundamental power to make sale of the public lands is contained in the section of the constitution that provides: "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Section 3, art. 4, Const. U. S.

Under this provision of the constitution, congress, at a very early day, created the general land-office, and subdivided the public domain into land-districts for the sale and disposition of the public lands. This bureau or land department was at one time attached to the treasury department of the government, and was also at one time, in part, subject to the supervision of the war department, and also of the president of the United States; but later on this bureau became an adjunct of the

interior department, and has since that time so remained. The secretary of the interior department is now charged with the entire supervision of the public lands, and all public business relating thereto. Section 441, Rev. St. U. S., provides, among other things, as follows: "The secretary of the interior is charged with the supervision of public business relating to the following subjects: *First*, the census, when directed by law; *second*, the public lands, including mines." And the commissioner of the general land-office is charged with the performance of all executive duties appertaining to the sale of the public lands.

Section 453, Rev. St. U. S., reads as follows: "The commissioner of the general land-office shall perform, under the direction of the secretary of the interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government."

It will be seen from these sections, and accompanying sections of the Revised Statutes, that the secretary of the interior is charged with the entire supervision of the survey and the sale of the public lands, and that the commissioner of the general land-office acts under his direction in executing the land laws of the United States. All sales and disposition of the public lands must pass under the inspection of the secretary of the interior in person, or that of the commissioner of the general land-office, by direction of the secretary of the interior. The register and receiver are but local officers of the several land-districts, charged with the performance of certain duties of a *quasi* judicial character, and subject to the direction and supervision of their superior officers, the commissioner of the general land-office and the secretary of the interior. These duties may be said, in general, to be to pass upon the qualifications and rights of the claimants to file upon and enter any part of the public lands, and to ascertain whether the lands applied for are open to settlement, and, finally, whether the applicant, in offering to prove up,

has complied with the land laws and regulations of the department.

No section in the statutes makes any decision of the register and receiver final in express terms, and no section, by direct inference, implies that any decision of the local officers is not subject to revision and supervision, unless it be section 2273, which provides that "all questions as to the right of pre-emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decision of the district officers, in case of contest for the right of pre-emption, shall be made to the commissioner of the general land-office, whose decision shall be final, unless appeal be taken to the secretary of the interior." While this section is peculiar in its language, and in its terms is confined to pre-emption claims, and makes the decision of the commissioner final in such cases, unless appeal be taken to the secretary of the interior, and while it omits to state that the decision of the register and receiver shall be final unless an appeal be taken therefrom, yet the section has been generally construed to mean that, in case of *contest* as to the rights of pre-emption, the decision of the local officers, as to matters of fact, is final, unless an appeal be taken; and has generally been so respected by the department and the courts. Outside of this section we look in vain for an appeal from the decision of the local officers, or any section giving them the right of "determining" any question connected with their duties. It has been the practice, however, as I am informed, to permit appeals from the local officers to the commissioner and secretary upon many, if not all, the applications made by settlers, in any matters affecting their rights to the public lands; but this is done under the rules and regulations of the department, which form a large part of the land law of the country. It is therefore left very indefinite by the statutes as to what is the character of the jurisdiction exercised by the secretary and the commissioner over the local officers. In but one section is appellate jurisdiction expressly named, and there no provision is made as to procedure upon appeal, or

as to whether upon appeal the case is heard *de novo*, or reviewed upon the case as made below. But it matters little in effect whether the jurisdiction be classed as revisory or appellate. No court has ever claimed that the commissioner or the secretary hears the case *de novo*; and whether they act as appellate tribunals proper, or boards of supervision, the result is practically the same. The secretary of the interior, and, under his direction, the commissioner of the general land-office, has a general "supervision of all public business relating to the public lands." What is meant by "supervision?" Webster says supervision means "to oversee for direction; to superintend; to inspect; as to supervise the press for correction." And, used in its general and accepted meaning, the secretary has the power to oversee all the acts of the local officers for their direction; or, as illustrated by Mr. Webster, he has the power to supervise their acts for the purpose of correcting the same; and the same power is exercised by the commissioner, under the secretary of the interior. It is clear, then, that a fair construction of the statute gives the secretary of the interior, and, under his direction, the commissioner of the general land-office, the power to review all the acts of the local officers, and to correct, or direct a correction of, any errors committed by them. Any less power than this would make the "supervision" an idle act,—a mere overlooking, without power of correction or suggestion. It is further evident, from a careful reading of the statute, that whatever distinction exists, or was intended to exist, between the appellate and supervisory power there given, the supervisory power is general, and applies to all business of the land department,—to matters appealable and those not appealable; so that if it be conceded that, in matters of contest between pre-emption settlers, the determination of the local officers be final, it would still be in the power of the secretary to so far revise their acts as to call their attention to errors which they themselves have committed, and that their action would not be final so long as any power of revision exists, either in themselves or a higher tribunal. Legislative bodies have the power of reconsideration

of their acts, subject to rules prescribed and limited, up to the time of their final approval; and the acts of administrative and executive bodies are subject to revocation until they become final by proclamation, adoption, or approval in the manner prescribed by law. Even the judgments of courts are open to be modified or revised by the court rendering them during the term at which they are rendered. With how much greater force may it be argued that the acts of the local officers do not bind the department or the government until they have been examined and supervised by the commissioner of the general land-office, and that, until their acts have received the approval of the general land-office, they may be revised and corrected, or sent back for re-examination and correction. If the supervision placed in the hands of the secretary of the interior be anything less than this; if the local officers are sole arbiters of all questions of fact submitted to them, so that there is no power of correcting any mistake made by them, or any fraud imposed upon them,—then is the supervision of the department, as we have already said, an overlooking, without any power of direction; and the duties of the secretary and commissioner are ministerial, which the court could control by *mandamus* and injunction,—a power which the courts have uniformly refused to exercise which we shall see further on in this opinion.

It is said, proof must be made to the "satisfaction of the register and receiver only, as to residence and improvements, and that, upon making such proof, the entry-man receives his certificate, which entitles him to a patent; that the commissioner has no power to cancel this certificate; that the power of cancellation is essentially a judicial one; that the right conveyed by the certificate is a vested one; and that he cannot be deprived thereof without due process of law." This is a plausible statement of the proposition. But, in the first place, the commissioner or secretary is not seeking to pass upon the rights of the parties in a collateral proceeding; they are only reviewing, for the purpose of approval or rejection, the action of subordinate officers. They are not seeking to take original juris-

diction of an independent proceeding; their action is but the second step in the proceeding instituted by the pre-emptor himself to obtain title to his land. And what reason exists, it may well be asked, why the register and receiver may not a second time as well inquire as to the residence and cultivation of the land, as in the first instance? Who doubts the right of the register and receiver, in the first instance, to institute as rigid an examination of the parties and the witnesses as they may deem necessary and proper? And why are they not as well qualified to do this at a second as at the first examination of the case? Those officers are not required or permitted to *try* the question of fraud or perjury between individuals; that belongs to another and a judicial tribunal. They are allowed to investigate alleged fraud so far only as to determine what are the real facts as to settlement, residence, and cultivation. As to the question of cancellation of the certificate, the pre-emption law makes no provision for such an instrument to be executed by the local officers. It is a mere matter of department practice, for its protection, and the protection of the claimant; but it has no recognition in law requiring its issue or cancellation. It is true that the homestead law, enacted more than 20 years after the passage of the pre-emption law, recognizing the practice which had grown up under it, does speak of a "certificate," and indirectly recognizes such an instrument by prohibiting "any certificate or patent to issue before the expiration of five years;" but no provision is anywhere made for the making or issuing of such instrument. It is wholly a creation of department rule and regulation.

And the impropriety of the term "vested right," as applied to fraudulent entry, is apparent upon the statement of the proposition. It is true, the honest settler who has made proof to the satisfaction of the local officers has an inchoate right—a sort of determinable fee—in the land, and, to that extent, a "vested right." If the land is subject to entry, and the claimant has the necessary qualifications, and has honestly complied with the statutes, and the rules and regulations of the department, he

may be said to have a vested interest or right in the land, which, except in contested questions of fact, where the land department is the final arbiter, he may follow into the courts after the jurisdiction of the land department has ceased; but, strictly speaking, a man can have no "vested rights" while any act remains to be done, or while any act of revision is unexercised,—certainly not as against the government, which can neither be compelled to exercise that supervision, or restrained in its unjust exercise. As well might the beneficiary of some legislative act claim a "vested right" in the benefit conferred prior to the limit of reconsideration or approval of the act; and the claim would have less right to be so classed had the beneficiary procured the favorable enactment by his own willful fraud and misrepresentation. And, as to the claim that proof must be made to the satisfaction of the register and receiver only, this is by no means so clear from a careful reading of the statute. Section 2263 reads as follows: "Prior to any entries being made under and by virtue of the provisions of section 2259, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land-district in which such lands lie, agreeable to such rules as may be prescribed by the secretary of the interior, and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void." To be sure, the register and receiver must be satisfied of the settlement and improvements required before entry can be made; but these words do not necessarily imply that their satisfaction is a finality upon the question of fact, or that the commissioner or secretary, in the exercise of their supervisory powers, may not also pass upon the sufficiency of the facts. The language of the homestead act is entirely different, and does not even state that it must be to their satisfaction; but it requires the claimant to prove, by credible witnesses, the facts of residence and cultivation. And the amendments made to this section, providing for taking the testimony before other officers than the register and receiver, provide that the register and receiver shall have the same fees

for "examining and approving" such testimony as they are allowed for "taking" the testimony in person. Section 2291, Rev. St. U. S. "Taking" and "examining" and "approving" testimony are feeble words to convey the implication of finality of action. But, concede all that can be claimed for these words of the sections under the pre-emption act, and that they made the local officers the final tribunal to pass upon the sufficiency of the facts as to settlement, residence, and cultivation, yet the supervisory power lodged in the secretary and commissioner would still give them the right to call the attention of the register and receiver to the mistake or fraud committed, and to direct them to re-examine the testimony and proofs with a view to correction of the alleged errors.

But it is said, the court is a so much better forum in which to determine such questions that congress could never have intended to allow men who are not generally lawyers to pass upon such important rights of the people. This argument might be urged with much greater force in case of *contesting settlers* for the same land,—a question in which the government has no interest further than that the land be awarded to the one entitled thereto; but in such cases the law may be said to be settled by the highest tribunal in the land that the decision of the department upon all questions of fact in such cases is final, and cannot be reviewed in the courts.

How, then, can it be argued that the courts can step in, pending the determination of a case in the land department, and cancel the final certificate or receipt, or annul any act of the department, or of one of its subordinate officers, in which public interests are involved? Congress has chosen, under its constitutional powers, to place the sale and disposition of the public lands under the management and supervision of the secretary of the interior. The land department is a bureau or tribunal, with its superior and subordinate officers; with its appellate and supervisory powers; and it is invested with the power to sell and dispose of the public lands of the United States, subject to statute law and such rules and regulations as the depart-

ment may see fit to adopt. No court or tribunal is designated for the hearing and determining of any question of fact that may arise in the performance of its duties. It has therefore, under the well-settled rule of the decisions, the power to determine all questions that arise in the exercise of the jurisdiction conferred; and, while many acts of the department involve the determination of questions of a grave judicial character, they are only collateral or incidental to the execution of the main duty imposed upon it, which is essentially of and pertaining to the executive or administrative department of the government. In theory, our government is divided into three great departments: the executive, legislative, and judicial. Although the jurisdiction of the one sometimes so overlaps that of the other, and the boundary line sometimes becomes so pale and indistinct, that it is not clear to the judicial eye, and the decisions of the court become confused and unsatisfactory, yet, when one of these departments is clearly charged with a certain jurisdiction, the courts will seek to protect and defend it, rather than to break down or invade it. It is upon this principle that courts will never declare a legislative enactment unconstitutional or void if any lawful meaning or construction can be given to it. And, upon the same principle, in the construction to be given to treaties, the courts will, if possible, follow the meaning given them by the executive and treaty-making powers. Here the congress, under its constitutional powers, has created this special tribunal, and conferred upon it this special jurisdiction over all the public lands. The duties required of the tribunal, administrative or executive in their character, are placed by the act of congress where they properly and necessarily belong,—under the supervision of an appropriate department of the executive branch of the government; and while any matter pertaining to the public lands, involving judgment and discretion, is pending before this department of the government, the courts will not interfere. This proposition may be said to be settled law. The supreme court has again and again refused to take cognizance of any matter pending for decision in the

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land department, or any subdivision of it; and has announced, as a settled rule of the federal courts, that until the patent issues the jurisdiction of the land department is not ended, and that until the patent has been signed and recorded the power of the courts cannot be invoked. And this conclusion of the courts has been reached, not from a desire to shirk any responsibility belonging to the judicial branch of the government, or from a lack of desire to extend to the hardy pioneer the entire authority of the courts in the protection of his legal rights, but from an absolute want of power to interfere with the executive department in the performance of the duties with which it is charged. It is not material to the decision of this case upon what particular grounds the courts decline to interfere with the acts and decisions of the executive department. It is not always easy to define what are strictly executive acts with which the courts will decline to interfere, upon the ground that they belong to a co-ordinate branch of the government; but it is admitted in American jurisprudence that the executive department of the government is invested with certain executive or political powers, in "the exercise of which the officer uses his own discretion, and for which he is accountable only to his conscience and his country." Such acts can never be examined in a court of justice. It will also be conceded that all acts not coming within this strict rule of executive action, but which affect *private rights*, may, in a proper case, be examined by the courts; but acts of such a tribunal, involving judgment and discretion, can never be examined in a court of *law*; and it is upon this ground that the federal courts decline to examine the acts of the land department. The courts are by no means, however, without the power of redressing wrongs, or of punishing offenses which may have been committed in this or any other department of the government; and the court of *equity* is always open to construe and give meaning to the acts of the executive officers, and to declare that done which in equity and good conscience ought to have been done. No branch of the government is without the reach of the *equity* arm of the court. Its powers sprang into

existence in the days of executive oppression and tyranny, and came to us by inheritance with the common law of our country.

Judgments of the higher courts are not beyond its jurisdiction. All executive and legislative acts are subject to its supervision when they are founded in fraud or mistake, or come within any of the well-known rules of equitable jurisdiction. It is upon and within this principle that the courts of equity have examined and reviewed the decisions of the land department. Courts of *law*, however, are powerless to act in such cases. No court of law can pronounce judgment upon any act of the land department, declaring it invalid, unless the act be absolutely void and of no effect; but the court of equity will review their acts so far as to determine whether its officers have violated or misconstrued any law under which they have acted, and whether they have been imposed upon by fraud or mistake, and by which the rights that have been conferred upon one settler should have inured to the benefit of another; and if it is found, upon an investigation of their proceedings, that such error has been committed, it will be corrected, not by declaring their acts void, but by declaring them to have done what the law presumes they would have done but for the commission of such error, and by decreeing the title to the land which passed by the patent to the one so entitled thereto.

Such being the law as announced by the courts, what absurd results would follow the decision that no tribunal but a court could cancel a final certificate once issued!

Must the commissioner and secretary pause when, in the exercise of their supervisory powers, they find the local officers have been imposed upon by fraud, and go to the courts, where litigation may be prolonged for years, before the case can be closed upon the books of the department? And when a decision were once reached, of what binding force or effect would it be upon the department? It is very clear, within the decisions, that the courts of equity would not cancel the certificate. The most they could do would be to declare that the certificate belonged to another; and, as the courts cannot control the department in

its issue of the patent, it could still issue the patent to the original certificate holder, making still another suit necessary to convey the title.

The better rule then is, as laid down by the courts, that they will not interfere with the acts of the land-officers so long as the department has jurisdiction to act, or until its jurisdiction has ceased, and its determination become final, by issuance of the patent. And the reason for this rule is that so long as any tribunal has jurisdiction of the subject-matter, and errors have occurred, the presumption is that it will correct such errors before its jurisdiction ceases. Within this rule, our own supreme court at the May term, 1886, in *Territory v. District Court*, 30 N. W. Rep. 145, dismissed the writ of *certiorari*, because it appeared in the proceedings that the motion had been made in the court below, and was undetermined, to vacate or modify the order complained of; and, if this is true as to appellate courts in matters for review by *certiorari* or appeal, *a fortiori* the principle may be invoked in cases like the present, where the courts have no power to review by appeal or otherwise, and where their judgments are without force to order the department to act, or cease to act.

The principles here enunciated, and the conclusions of law arrived at, are deducible from, and, in our judgment, are fully sustained by, the decisions of the supreme court of the United States, and the later decisions of the supreme courts of the different states. As early as *Bagnell v. Broderick*, 13 Pet. 436, the supreme court of the United States announced the doctrine "that congress has the sole power to declare the effect and precedence of titles to the public lands emanating from the United States; and that, whatever may be the equities outstanding in third persons, the patentee has the legal title; and that the state law cannot confer upon the equitable owner the right to maintain ejectment against the patentee." See, also, *Wilcox v. Jackson*, 13 Pet. 498.

Barnard's Heirs v. Ashley's Heirs, 18 How. 43, is one much in point upon the proposition that the action of the register and

receiver, in issuing the certificate or receipt, is not final, but that their action is subject to the supervision of the commissioner and secretary. It was contended in that case that the action of the register and receiver was final; that the commissioner had no power to reverse their findings upon the questions of fact; nor had the courts any power to review their action in determining the right of pre-emption. The court denies both of these propositions; and Mr. Justice CATRON, in delivering the opinion of the court, says: "In cases arising under the pre-emption laws of the 29th of May, 1830, and of the 19th of June, 1834, the power of ascertaining and deciding on the facts which entitle a party to the right of pre-emption was vested in the register and receiver of the land-district in which the land was situated, from whose decision there was no direct appeal to higher authority. But, even under these laws, the proof on which the claim was to rest was to be made 'agreeably to the rules to be prescribed by the commissioner of the general land-office;' and, if not so made, the entry would be suspended when the proceeding was brought before the commissioner by an opposing claimant. In cases, however, like the one before us, where an entry had been allowed on *ex parte* affidavits, which were impeached, and the land claimed by another, founded on an opposing entry, the course pursued at the general land-office was to return the proofs and allegations, in opposition to the entry, to the district office, with instructions to call the parties before the register and receiver, with a view of instituting an inquiry into the matters charged,—allowing each party, on due notice, an opportunity of cross-examining the witnesses of the other, each being allowed to introduce proofs; and, on the close of the investigation, the register and receiver were instructed to report the proceedings to the general land-office, with their opinion as to the effect of the proof, and the case made by the additional testimony. And on this return the commissioner does in fact exercise a supervision over the acts of the register and receiver. This power of revision is exercised by virtue of the act of July 4, 1836, § 1, which provides 'that, from and after

the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed, by law, pertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the commissioner of the general land-office, under the direction of the president of the United States.'

"The necessity of 'supervision and control,' vested in the commissioner, acting under the direction of the president, is too manifest to require comment further than to say that the facts found in this record show that nothing is more easily done than apparently to establish, by *ex parte* affidavits, cultivation and possession of particular quarter sections of land when the fact is untrue. That the act of 1836 modifies the powers of registers and receivers, to the extent of the commissioner's action in the instance before us, we hold to be true; but if the construction of the act of 1836, to this effect, were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety."

While this decision was founded upon the act of 1836, it will be observed that the provisions of the section quoted, upon which the court relies for the power of the commissioner to reverse the action of the local officers on questions of fact, do not materially differ from the powers conferred by sections 441, 453, Rev. St. U. S., upon the secretary of the interior and the commissioner of the general land-office; and the concluding portion of the quotation, that, "if the construction of the act were doubtful, the practice for nearly twenty years could not be disturbed without manifest impropriety," applies with equal and greater force to the case at bar; for the practice which it seems by that decision obtained under the act of 1836, and was continued under the act of 1841, of returning the proofs and allegations to the local office, with instructions to call the parties before them for inquiry into the matters therein charged, and

which, at the time of the rendition of that opinion, had been, says the court, the practice for "nearly twenty years" has been now the practice for more than fifty years.

Justice MILLER, in *Johnson v. Towsley*, 18 Wall. 82, referring to this decision, and the power of supervision vested in the commissioner and secretary, says: "By the first section of the act to reorganize the general land-office, approved July 4, 1836, it was enacted that the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands, and the issuing of patents for all grants of land, under the authority of the United States, shall be subject to the supervision and control of the commissioner of the general land-office, under the direction of the president of the United States. In the case of *Barnard's Heirs v. Ashley's Heirs*, 18 How. 45, it was held that this authorized the commissioner to entertain appeals from decisions of the register and receiver in regard to pre-emption claims, and it is obvious that the direct control of the president was contemplated whenever it might be invoked."

Bell v. Hearne, 19 How. 252, was a case where the receiver, under the act of 1820, made two receipts for the purchase money,—one in the right name of "John Bell," and the other, which he forwarded to the general land-office, in the name of his brother, "James Bell,"—and the patent was issued to "James Bell;" but the commissioner of the general land-office in 1850, 11 years after the entry, upon his attention being called to these facts, recalled the patent, and changed the certificate from "James Bell" to "John Bell." Counsel for James Bell and his grantees denied the power of the commissioner to change the certificate, or to recall the patent; but the court, denying the position of counsel, by Justice CAMPBELL says: "The question, then, arises, had the commissioner of the general land-office authority to receive from John Bell the patent erroneously issued in the name of 'James Bell,' and to issue one in the proper name of the purchaser? And the question, in our opinion, is exceedingly clear. The commissioner of the general land-office exercises a general

superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud in the important and extensive operations of that officer for the disposal of the public domain." 19 How. 262.

In *Magwire v. Tyler*, 1 Black, 195, the secretary of the interior set aside a survey made under a confirmed Spanish grant, and ordered another to be made, and a patent issued under it; and the supreme court, in sustaining the action of the secretary, and the commissioner of the general land-office acting under his direction, uses the following language: "By the act of July 4, 1836, reorganizing the general land-office, plenary powers are conferred on the commissioner to supervise all those surveys of public lands, and 'also such as relate to private claims of land and the issue of patents.' By the act of March 3, 1849, the interior department was established. The third section of the act vests the secretary, in matters relating to the general land-office, including the powers of supervision and appeal, with the same powers that were formerly discharged by the secretary of the treasury. The jurisdiction to revise on the appeal was necessarily co-extensive with the powers to adjudge by the commissioner. We are therefore of the opinion that the secretary had authority to set aside Brown's survey of Labeaume's tract, order another to be made, and to issue a patent to Labeaume, throwing off Brazeau's claim." 1 Black, 202.

The case of *Harkness v. Underhill*, Id. 316, is in point in the determination of the question before us. It is true, the rights of the parties were founded upon the pre-emption acts of 1832 and 1834, and that other questions were before the court, such as estoppel, the rights of innocent purchasers, etc., and were determined in the case; but the question here presented was there squarely presented, and passed upon by the court. The case is not very well reported; the decision itself not stating the facts, and the statement of facts given by the reporter being somewhat obscure. Yet it sufficiently appears from the case, as

reported, that one Waters went upon the land as a pre-emptor under the act of 1832, put up what is styled a "pen," without any roof, and in which he slept only one night. Waters offered to prove up, and produced his own and the affidavits of other witnesses to the local land-officers, tending to show residence, cultivation, etc., but his entry was denied upon the ground that the surveys were not extended over the land. Waters subsequently died without proving up, and his heirs perfected the entry, and obtained the usual certificate. Stillman subsequently informed the commissioner of Waters' failure to reside upon and cultivate the land, and thereupon the commissioner instructed the local officers "that if they believed the facts, as respects the frauds practiced to obtain the entry in Waters' name, to treat it as void for fraud, and to allow Stillman's heirs to enter the land." And this was accordingly done. The entry in Stillman's name was made under the occupant law of 1834. A patent was subsequently issued to Stillman; and this plaintiff, as one of the heirs of Waters, brought this action to compel the grantee of Stillman to convey. Mr. Williams, attorney for complainants, makes the issue squarely in his brief, as follows: "That the register and receiver, having sold the land to Waters in conformity with the instructions of the commissioner of the general land-office, had no further power or jurisdiction over it; nor had the commissioner of the general land-office power to set aside the sale, even for fraud. This could only be done by judicial authority." And Mr. Carlyle, attorney *contra*, in his brief, answers the proposition as follows: "No one but a settler and housekeeper upon the land was entitled to the right of pre-emption under the act of April 5, 1832. Waters was not a settler or housekeeper. He had, therefore, no right, no title, nothing but a fraudulent claim, wholly worthless and void. That being its character, the register and receiver and commissioner of the general land-office had authority to rescind, set aside, and treat as a nullity the entry made by his heirs on the false proofs produced by him in his life-time." The question was therefore squarely presented to the court by opposing counsel; and after

determining the other questions presented in the case, and after the statement of facts as to the cancellation of Waters' entry by the commissioner, the court, by Mr. Justice CARRON, upon this proposition, says: "The question is again raised whether this entry, having been allowed by the register and receiver, could be set aside by the commissioner. All the officers administering the public lands were bound by the regulations published May 6, 1836, (2 L. L. & O. 92.) These regulations prescribe the mode of proceeding to vacate a fraudulent occupant entry, and were pursued in the case before the court. This question has several times been raised and decided in this court, upholding the commissioner's powers;" citing *Garland v. Wynn*, 20 How. 8, and *Lytle v. State*, 22 How. 193.

In *Grimes v. Thompson*, 7 Wall. 347, the secretary of the interior having directed the commissioner of the general land-office to cancel an entry under which Gaines and others claimed a right to certain lands in Arkansas, they brought suit in the circuit court of the District of Columbia to restrain such cancellation, setting up their equitable claim to the land. The commissioner entered a plea to the jurisdiction of the court to interfere by injunction, and upon appeal to the supreme court of the United States the plea was sustained. Says the court, by MILLER, J.: "Certain powers and duties are confided to those officers, and to them alone; and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment, while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of *mandamus*." A similar doctrine is announced by the court in *Secretary v. McGarrahan*, 9 Wall. 298, where a *mandamus* was brought to compel the affirmative action of the secretary to issue a patent upon showing made.

In *Frisbie v. Whitney*, 9 Wall. 187, the court, in delivering the opinion by Mr. Justice MILLER, uses the following pertinent language in reference to the supervisory powers of the department: "When all these prerequisites are complied with, [referring to settlement, cultivation, making proof, etc.,] and the claimant has paid the price of the land, he is entitled to a certificate of entry from the register and receiver; and after a reasonable time to enable the land-officers to ascertain if there are superior claims, and if in other respects the claimant has made out his case, he is entitled to receive a patent, which for the first time invests him with the legal title to the land."

Litchfield v. Register, 9 Wall. 575, was a case in which Litchfield claimed to be the owner of a large tract of land granted to the territory of Iowa for improving navigation of the Des Moines river, and he brought this action to restrain the register and receiver from allowing persons to file upon such lands. The bill was very full, setting out the grant and his claim of title; that the lands were in no manner public lands, nor subject to entry at the land-office; and that his title would become clouded by entry, etc. The bill was demurred to for want of jurisdiction, and the demurrer was sustained on appeal to the supreme court of the United States. Mr. Justice MILLER, delivering the opinion of the court, says: "He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the court in possession of their views, and defend their instructions from the commissioner, and convert the contest before the land department into one before the court. This is precisely what this court has decided that no court shall do. After the land-officers shall have disposed of the question, if any legal right of the plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the land department finally decides in his favor, he is not injured. If they give patents to the applicants for pre-emption, the court can then, in the appropriate proceeding, determine who has the better title or right. To interfere now is to take from the officers of the land department

the functions which the law confides to them, and exercise them by the court."

Johnson v. Towsley, 13 Wall. 72, was a contest between pre-emption claimants, in which the local land-officers decided, upon the facts, in favor of Towsley, and the commissioner on appeal affirmed their decision, but the secretary of the interior reversed the decision of the commissioner, and awarded the land to Johnson, not upon the facts, but upon the ground that Towsley was not a qualified pre-emptor, having already filed a declaratory statement for another tract of land. A patent having issued to Towsley before appeal to the secretary of the interior was taken, and a junior patent having, notwithstanding, issued to Johnson after decision of the secretary of the interior, Towsley brought this action to remove cloud, etc. The case was very elaborately argued, and the supreme court, by MILLER, J., goes over the entire ground of the jurisdiction of the courts to review the action of the land department, and affirms the decree of the supreme court of Nebraska in declaring the second patent void, upon the ground of misconstruction of law by the secretary of the interior. The court reaffirms its former decisions in which the action of the department upon questions of fact, or of mixed law and fact, is declared to be final, and puts the right of the court of equity to review the action of the land department upon the same ground which gives it jurisdiction to examine judgments of courts of law, or the decisions of any tribunal procured through fraud, mistake, etc. Upon the questions of jurisdiction the court says: "But, while we find no support to the proposition or counsel for plaintiffs in error in the special provisions of the statute relied on, it is not to be denied that the argument is much stronger when founded on the general doctrine that, when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. That the action of the land-office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be

admitted under the principle above stated; and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in the courts of equity the power, in certain classes of cases, to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and, by virtue of this power, the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land-office should constitute an exception to this principle. In dealing with the public domain, under the system of laws enacted by congress for their management and sale, that tribunal decides upon private rights of great value; and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influence of frauds, false swearing, and mistakes. These are among the most ancient and well-established grounds of the special jurisdiction of courts of equity just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than its application to cases arising in the land-office." And further on in the same opinion the court says: "This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government; and, in reference to the proceedings before the officers intrusted with the charge of selling the public lands, it has frequently and firmly refused to interfere with them in the discharge of their duties, either by *mandamus* or injunction, so long as the title remained in the United States, and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed

from the government, and the question became one of private right, whether, according to the established rules of equity and the acts of congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the land department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice, and to a sound administration of the law." The decision, it will be observed, makes the jurisdiction of the court to depend upon the fact that a private right is affected; that until the patent has issued the title is in the government; and that the matter belongs to the land department, and is *in fieri*.

Myers v. Croft, 13 Wall. 291, merely holds that the pre-emptor after entry, and before patent issues, may dispose of or sell the land. It is merely a judicial construction of the words of the pre-emption act, "all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void." It was and had been contended that all conveyances after entry, and before patent issue, were, by force of this statute, null and void; and that case merely decides that the prohibition goes to transfers of the *pre-emption right*, and not to transfers of the *land*. The case in no respect intimates that the grantee would get any better title than his grantor had, or that any title would pass if the grantor had not in good faith entered the land conveyed; but the concluding portion of the opinion indicates very strongly the contrary opinion of the court: "If it had been the purpose of congress to attain the object contended for, it would have declared the lands themselves unalienable until the patent was granted. Instead of this, the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after the entry, *if at that time he was in good faith the owner of the land, and had done nothing inconsistent with the provisions of the law on the subject.*"

This very provision against the assignment or transfer of the

pre-emption right is a very strong argument in favor of the right of the commissioner and secretary to review the action of the register and receiver in allowing the entry. The right of pre-emption is a valuable one, and but for such prohibition would be assignable, and the right of the fraudulent pre-emptor might pass into the hands of the innocent and *bona fide* holder before it could be revised or passed upon by the supervising officers. This statute was enacted to prevent such transfers, and to give the department time to examine the entry. This view is strengthened by the fact that a similar provision is found in the act of 1830, and that prohibition was removed in the subsequent act of 1832, and the patent was permitted to issue in the name of the assignee; but, when the general act of 1841 was enacted, the original safeguard as to assignments was again included by congress, and the prior legislation of 1830 re-enacted.

The case of *Marquez v. Frisbie*, 101 U. S. 473, is directly in point, and announces the rule very clearly which must govern this case. The appellant brought his action in the state court, alleging—*First*, that the land department mistook the law of the case; *second*, that its decision was obtained by fraud. The subject-matter of the suit was a quarter section of land which had been awarded to appellees by the local land-officers upon a contest of the pre-emption right, and their decision had been affirmed on appeal by the commissioner and the secretary of the interior. The appellant was in possession, and prayed that the title which might pass by issue of the patent to appellees should be conveyed to or inure to his use and benefit; that he be declared the true owner; and that his right to the legal title be paramount.

The case was heard in the inferior state court on demurrer to the petition, which was sustained; and the judgment there rendered against plaintiff was affirmed by the supreme court of the state, from which judgment the plaintiff appealed to the supreme court of the United States. The patent had not issued, but the decision of the secretary of the interior, it seems, had been rendered, directing patent to issue. The supreme court, in affirming the judgment of the court below, and denying the plaintiff's

right to maintain the action, says: "One of them [fatal objections to the complaint] is that the principal relief sought, that without which any other would be imperfect, is that defendants may be declared to hold the land in trust for plaintiff, and compelled to convey the same accordingly. This undoubtedly means the legal title to the land; for he alleges that he was in actual possession at the time of instituting the suit, and for a great many years before. But the bill does not show that the defendants, or either of them, ever had the legal title. On the contrary, it is a necessary conclusion from the allegations of the bill that the legal title is in the United States. After referring to the decision of the secretary of the interior against his claim, the petition says that, 'in pursuance of this decision, an order was issued authorizing the defendants, and other purchasers of the Vallejo title, to enter the lands claimed by them; and the said defendants have entered, and will be enabled to receive a patent for, the said quarter section.' It plainly appears from this—*First*, that the defendants had not the legal title; *second*, that it was in the United States; and, *third*, that the matter was still *in fieri*, and under the control of the land-officers. Nothing in the record of the case gives evidence that any further steps in that department have been taken in the case. We have repeatedly held that the courts will not interfere with the officers of the government while in the discharge of their duties, in disposing of the public lands, either by injunction or *mandamus*. *Litchfield v. Register*, 9 Wall. 575; *Gaines v. Thompson*, 7 Wall. 347; *Secretary v. McGarrahan*, 9 Wall. 298. And we think it would be quite as objectionable to permit a state court, while such a question was under the consideration and within the control of the executive departments, to take jurisdiction of the case by reason of their control of the parties concerned, and render decree, in advance of the action of the government, which would render its patents a nullity when issued.

After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before. *Johnson v. Towsley*,

13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330. We did not deny the right of the courts to deal with the possession of the land prior to the issue of the patent, or to enforce contracts between the parties concerning the land; but it is impossible thus to transfer a title which is yet in the United States."

Here is distinctly announced by the supreme court the doctrine that the courts will not interfere to determine the rights of parties while the case is pending before the department, even when the decision of the department is already announced, before patent issues. The case is still *in fieri* until the patent is issued. The case is quite in point; but a much stronger case is here presented for the application of the rule announced, where the court is asked to pronounce upon the validity of the final receipt prior to the *contest or review* had by the commissioner or secretary.

U. S. v. Schurz, 102 U. S. 378, is a case in which the patent had been signed, sealed, and recorded, and sent to the local office for delivery, and had been subsequently recalled by the department. The proceeding was by *mandamus* on the part of the patentee to compel delivery of the patent by the secretary of the interior, and the question was whether the title had passed to the patentee, so that he was entitled to the delivery of the patent. It was contended, on the one side, that title passed by delivery of the patent, as in case of a deed; and, by the other side, that it passed by record. The court adopted the latter view, and held the act of delivery a mere ministerial act; that the title passed by record of the patent in the general land-office; that the jurisdiction of the land department was then at an end, and the courts could then take jurisdiction and compel a delivery.

The case was ably presented, and the opinion by Justice MILLER reviews the entire jurisdiction of the courts to interfere with the acts of the land department, and lays down the rule, affirming the former doctrine, already announced, that the court will not interfere with the action of the land department until its jurisdiction ceases, and that such jurisdiction ceases when the patent issues or is recorded in the general land-office. Says

the court: "Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere." And, further on in the same opinion, the court says: "From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that, at some stage or other of the proceedings, their authority in the matter ceases. It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land does cease to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away."

The action of the secretary in recalling the patent in this case was sought to be sustained by showing that the land was not subject to homestead entry, and that the patent was therefore void; but the court, in answer to this proposition, and further defining the powers of the land department, says: "To the officers of the land department, among whom we include the secretary of the interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain. The land, in the present case, had been surveyed; and, under their control, the land in that district generally had been open to pre-emption, homestead entry, and sale. The question whether any particular tract belonging to the government was open to sale, pre-emption, or homestead right, is in every instance a question of law, as applied to the facts, for the determination of those officers. Their decision of such question, and of conflicting claims to the same land by different parties, is judicial in its character. It is clear that the right and the duty

of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department, before the successive officers of higher grade, up to the secretary. They have therefore jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made and recorded in the shape of the patent, how can it be said that the instrument is absolutely void for such errors as these?"

In *Quinby v. Conlan*, 104 U. S. 420, the holder of the patent brought ejectment to recover possession, and the defendant set up his defense, claiming to be the equitable owner, and demanding conveyance of the legal title, upon the grounds—*First*, that he was the prior pre-emptor, and that the land came within the Mexican grant entitling him thereto; but the court, in a careful review of the case, and denying the right of the court of equity to interfere, reaffirms the doctrine of the former cases, that upon all questions of fact the findings of the land department are final, and extends the rule to mixed questions of law and fact as well; and further says that the misconstruction of law which will authorize a court of equity to interfere must be clearly manifest, and it must appear that the fraud relied upon must necessarily have affected the action of the department. The court says: "It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the land department on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the court can, in a proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. *Johnson v. Towsley*, 13 Wall. 72; *Shepley v.*

Cowan, 91 U. S. 330; *Moore v. Robbins*, 96 U. S. 530. And we may also add, in this connection, that the misconstruction of the law by the officers of the department which will authorize the interference of the court must be clearly manifest, and not alleged upon a possible finding of the facts from the evidence different from that reached by them; and, where fraud and misrepresentations are relied upon as grounds of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegations of fraud and misrepresentations will not suffice."

Steel v. Smelting Co., 106 U. S. 447, 1 Sup. Ct. Rep. 389, was ejectment brought by the holder of the patent to recover possession. The defendant set up various defenses at law, and a counter-claim for improvements. A demurrer to the answer was sustained, and the question reached the supreme court of the United States upon the judgment sustaining the demurrer; and that court held that no defense at law could be set up against the patent; that infirmities of title upon which the patent was based could only be reached in a court of equity. The court, by FIELD, J., in reiterating the doctrine so often asserted, almost impatiently adds: "We have so often had occasion to speak of the land department, the objects of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject.

"That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and

is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions." And, further on in the same opinion, the court, in determining what the remedy is, and when it can be claimed, says: "So with a patent obtained for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possessed such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy, with respect to the land, no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation. It cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves. Their power over the land is ended when the patent is issued and placed on the records of the department. This can be accomplished only by regular judicial proceedings, taken in the name of the government for that special purpose."

Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. Rep. 249, was a case of contest between two homesteaders for the same quarter section of land. The local officers decided in favor of Johnson, and the commissioner on appeal affirmed the decision; but the secretary of the interior reversed the decision of the officers below, and awarded the patent to Lee. Upon suit instituted by Johnson in the state court of Michigan, the supreme court of that state took jurisdiction, and entered decree compelling conveyance to Johnson, upon the ground that the question before the register and receiver was whether Johnson had *abandoned* the land, and upon that question their decision was sustained by the commissioner; but that the secretary of the interior, while admitting the correctness of their decision upon the question of *abandonment*, awarded the patent to Lee on the ground that *no settlement* was ever made by Johnson, as required by the homestead act,—a question not before him on appeal,—and that

his decision was the exercise of *original* and not *appellate* jurisdiction. But the supreme court of the United States, reversing the supreme court of Michigan, held that the question determined by the secretary was properly before him, and was concluded by his decision, and that the courts had no jurisdiction to review its correctness; and in this opinion the court very clearly states when and upon what ground the courts will interfere to examine the decisions of the land department: "The defendant in the court below, the plaintiff in error here, is the holder of a patent of the United States for a parcel of land in Michigan, issued to him under the homestead laws; and the present suit was brought to charge him as trustee of the property, and to compel a conveyance to the plaintiff. The patent having been issued by officers of the land department, to whose supervision and control are intrusted the various proceedings required for the alienation of the public lands, all reasonable presumptions are indulged in support of their action. It cannot be attacked collaterally, but only by a direct proceeding instituted by the government, or by parties acting in its name and by its authority.

"If, however, those officers mistake the law applicable to the facts, or misconstrue the statutes, and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake, and compel the transfer of the legal title to him as the true owner. The court, in such a case, merely directs that to be done which those officers would have done if no error had been committed. The court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact, concerning which those officers may have drawn wrong conclusions from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which congress has devolved exclusively upon the department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully considering it, that a court will look into the evidence. It is not enough, however, that

fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented. It must appear that they affected its determination, which otherwise would have been in favor of the plaintiff. He must in all cases show that, but for the error or fraud or imposition of which he complains, he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought; not for the government, which can file its own bill when it desires cancellation of the patent unadvisedly or wrongfully issued."

While, from this review of the decisions of the supreme court of the United States, it will be observed that the court has uniformly declined to review the action of the land department until its jurisdiction has ceased, and to determine the finality of title until after the patent has issued, yet it is nowhere denied that courts of law may not always be appealed to, in furtherance of the decisions of the department during its exercise of jurisdiction, to protect the possession of the settler upon the public lands. And the undoubted weight of authority, as evidenced by the decision of the courts of last resort in the various states and territories, is in accordance with the views expressed by the supreme court of the United States.

In *Root v. Shields*, 1 Woolw. 340, Judge MILLER, of the United States supreme court, at the circuit, sustaining the action of the commissioner in canceling the prior entry of Root, a pre-emptor, and in issuing patent to a junior purchaser, upon the ground that the prior entry was void as coming within the boundaries of the incorporated city of Omaha, says: "It is further insisted, on behalf of the defendants, that they are *bona fide* purchasers, and that they, as such, are entitled to the protection of the court. I think it pretty clear that some, at least, of these defendants purchased and paid their money without any knowledge in fact of any defect in the title. Yet they are not *bona fide* purchasers for a valuable consideration without notice, in the sense in which the terms are employed in courts of equity; and this, for

several reasons. They all purchased before the issue of the patent. The more meritorious purchased after the entry had been assailed, and decided against by the land-office. But that is a circumstance not material to this consideration. Until the issue of the patent, the legal title remained in the United States. Had his entry been valid, Shields would have taken only an equity. His grantees took only an equity; they did not acquire the legal title; and, in order to establish in himself the character of a *bona fide* purchaser, so as to be entitled to the protection of chancery, the party must show that in his purchase, and by the conveyance to him, he acquired the legal title. If he have but an equity, it is overreached by the better equity of his adversary."

The decisions of various state courts will be more intelligently comprehended in grouping them by states. *Arnold v. Grimes*, 2 Iowa, 1, is cited and much relied upon as announcing a contrary doctrine. The case is an early one. Arnold first entered the land in controversy under the pre-emption act of 1840, and obtained a final certificate. Then Chapman, who settled upon the land about the same time, after Arnold's entry, applied for leave to contest. After considerable correspondence, and after Chapman had notified the commissioner that Arnold had conveyed the land by deed, prior to his entry, which deed in fact, however, had been obtained by Chapman himself by fraud and duress, upon Chapman's letter; the commissioner directed an inquiry by the register and receiver; and, they finding such deed to have been made, the commissioner canceled Arnold's entry. Subsequently Arnold went to the court, and got the obnoxious deed set aside, and declared null and void, as having been executed under duress. He then applied to the department to have his entry reinstated; but in the mean time Chapman had been allowed to enter the land, and patent had been issued to him. The department at first declined to interfere, and advised Arnold to go to the courts; saying that the department would not have permitted Chapman's entry if the deed had been canceled when he made application to enter the land. And, upon fur-

ther application by Arnold, the department, to protect him, finally issued a second patent, and canceled Chapman's patent. Upon this state of facts the Iowa court held that the junior patent, issued upon the prior certificate, must prevail. That is all this case decides. The equities were all with Arnold; the department had done all it could to reinstate Arnold's claim, and advised the action of the courts; and the court of equity, enforcing the equitable rights of Arnold, seems to have validated the act of the department in issuing the patent to Arnold, rather than to have sought to invalidate its former acts. The question of fact upon which the court *seems* to conclude that the cancellation of Arnold's certificate was void, is that no appeal lay, under the act of 1840, to the commissioner, and that the action of the register and receiver was final. It says: "Did such an appeal exist? And was one taken? No act of congress is found giving such an appeal prior to that of September 4, 1841, which allowed an appeal to the secretary of the treasury. The prior pre-emption laws of May 29, 1830, June 22, 1838, June 1, 1840, contain no such provision. And by the instructions issued upon the act of 1838, when the register and receiver decided against a claimant, and he, being desirous of it, requested in writing the opinion of the general land-office, they are directed to transmit the papers and proofs. Thus far it would seem that, if the claim was *rejected* below, the commissioner might review it; but if the claim was allowed, and a certificate of purchase issued, no authority is yet seen for setting it aside."

This case was determined in December, 1855, and it would seem that the case of *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43, decided at the December term, 1855, had not then been handed down, for no mention is made of the case; and the doctrine announced is in direct conflict with the statements of Judge CATRON, that an appeal did lie to the commissioner from the register and receiver by virtue of the section that gave him *supervision and control*.

In *Bellows v. Todd*, 34 Iowa, 31, the homestead entry of the defendant, under which he claimed to hold the land, had been

canceled by the commissioner of the general land-office, and the plaintiff offered to show this fact in rebuttal; but the court below sustained defendant's objection; and the supreme court, reversing the case upon this and other errors committed, uses the following language: "After defendant had closed his evidence, the plaintiff offered in rebuttal a writing from the department of the interior, signed by the commissioner of the general land-office, directed to the register and receiver of the local land-office at Fort Dodge, dated January 16, 1869, showing a cancellation of the defendant's homestead entry, which was objected to by defendant, and the objection sustained by the court. This ruling is assigned as error. This ruling was evidently erroneous. That the evidence offered was material, requires no argument to show. That it is competent for the officers of the land department of the government to cancel sales and entries of land which they may find improperly made, has frequently been decided by the supreme court of the United States."

It does not appear from the decision upon what ground the entry had been canceled, and no reference is made to *Arnold v. Grimes*, *supra*. The court seems to lay down the proposition as one about which state courts do not differ, and one which is at rest in that state.

Sillyman v. King, 36 Iowa, 207, and *Cady v. Eighmey*, 7 N. W. Rep. 102, clearly decide that the equitable title is in the holder of the receipt; that the legal title, which passes by patent, dates back to such certificate or receipt, notwithstanding the remark of the court in the last case that the "issuance of the patent is a mere ministerial act," etc.

The case of *Brill v. Stiles*, 35 Ill. 309, is cited and relied upon as authority holding that the commissioner has no power to cancel the final certificate, and that his doing so is void; and the strong language of the court—that "the mere fact that it was so declared by the commissioner of the general land-office did not have the effect of vacating the entry. He is not a judicial officer, and has no power to decree rescissions of contracts. His determination in reference to the validity of that sale concluded

no one in his rights,"—would seem to indicate that such was the individual opinion of that judge. But an examination of the case shows that the plaintiffs filed their bill in equity, alleging that the grantor had entered the land in question at private entry, and paid his money therefor; that such entry was only liable to be defeated by a pre-emption entry within 30 days; that no pre-emption entry was made within the 30 days; and that his title became perfect. Nearly two years thereafter the defendant's grantor was permitted to enter the land, and received a patent therefor, and plaintiff asked to be decreed the legal title. The defendant answered, admitting the material allegations of the bill, but alleged that the former entry of the plaintiff had been canceled for some cause unknown to the defendant, and asked that the bill be dismissed for want of equity, which action was sustained; and it was to reverse such action of the court that the appeal was taken. The language of the court above quoted was used by Judge WALKER in reversing the case. Upon such facts it would seem the case should have been reversed.

The plaintiff had a clear equitable title to the land on the allegations of the bill. It was a private entry, subject only to be defeated by a pre-emption filing within 30 days,—a contingency which the bill alleges did not arise; and the defendant alleges that he does not know on what ground the commissioner canceled the entry. He did not cancel the entry on a question of fact, if the allegations of the bill are true; for there was but one contingency that could defeat him, to-wit, the filing of a pre-emption within 30 days, and that did not happen. The inference is that he must have canceled the entry upon some question of law; and such rulings of the commissioner, whether in the matter of canceling certificates or other executive action, is always open to review, and this was evidently the view of the court; for, following the language quoted, the court says: "If the entry was authorized by law, the title passed to him, subject only to be defeated by proof of a right of pre-emption; and, if unauthorized, he acquired no title. But until it was shown to have been illegally made, or to have been defeated by proof of a

pre-emption, the certificate of purchase was evidence of an equitable title."

There was also another fatal objection, says the court, to the ruling of the lower court, to-wit, "that the objection to the bill could only have been raised by demurrer," and not by motion.

But it will be idle to take time to examine the Illinois decisions further, and to reconcile any apparent conflict in them; for that court itself has saved us the trouble. In *Robbins v. Bunn*, 54 Ill. 48, after citing *Brill v. Stiles*, *supra*, and other decisions apparently in conflict with *Gray v. McCance*, and others, the court says:

"These two classes of cases may seem, at first, inconsistent with each other, and there are probably some expressions in the various opinions not strictly harmonious, but on further consideration it will be seen there is no real antagonism in the decisions. The cases in the first class [referring to *Gray v. McCance*, 14 Ill. 344, and others] relate to pre-emption claims upon which the land-officers have decided. The pre-emption law of 1830 required proof of the facts upon which the right of pre-emption depended, to be made to the satisfaction of the register and receiver, agreeable to rules to be prescribed by the commissioner of the general land-office. This, by implication, gave them the right to decide all cases of contested pre-emption, so far as they depend upon the fact of prior settlement; and this construction has been uniformly given to the law, as will be seen by the cases before cited, and in other authorities quoted in the opinions pronounced in those cases. The finding of the land-officers upon the facts in matters of pre-emption has been held conclusive by the courts, upon the familiar ground that such officers, in these proceedings, were acting in a *quasi* judicial capacity, and within the scope of their authority.

"But, on the other hand, when these officers have undertaken to cancel a patent or a certificate of entry for which a purchaser has paid his money, either at their discretion, or under some pretended regulation of the department which the law did not authorize, or under some clearly erroneous construction of the

laws of congress, the courts have held themselves not bound by such acts of the officers of the land department, because they were not exercising a judicial function within the limits prescribed by law. The cases cited by counsel for defendant will be found to relate to proceedings of this character. Between those two classes of authorities there is a clear and sound distinction. In the one, the proceedings of the land-officers are held conclusive, because judicial in their character, and within their conceded jurisdiction. In the other, such proceedings are held not conclusive, because they are either ministerial in their character, or, if judicial, beyond the authority given by the acts of congress."

This case was subsequently reversed by the supreme court of the United States, *eo nomine*, *Moore v. Robbins*, 96 U. S. 530, upon the ground that, as to the defendant Moore, the secretary of the interior had no power to entertain an appeal after the patent had issued, and as to the other defendant the secretary erred in a matter of law; but the principle of law announced by the Illinois court, above quoted, is confirmed by the supreme court, and the language of Justice FIELD in *Shepley v. Cowan*, 91 U. S. 340, is quoted, and approved as "aptly" stating the views of that court: "The officers of the land department are especially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if a fraud is practiced upon them, or if they themselves are charged with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decision; but for mere errors of judgment upon the weight of evidence in a contested case before them the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the president."

In *McLane v. Bovee*, 35 Wis. 27, McLane brought ejectment under his patent, and Bovee set up in defense that final certifi-

cate for the same land had been issued to him, and that, upon a trial had in the court, he had been adjudged possession under the certificate, and that such action was a bar, and that subsequent cancellation of his certificate by the commissioner was void. The court, denying both these propositions, says: "The most that can successfully be claimed for the present defendant, under the judgment of the former action, is that, when such an action was instituted, Frederick Bovee was seized of an estate in fee in the lands in question, belonging to the class which Professor Washburn denominates 'determinable fees,' which he defines to be 'fees which are liable to be determined by some act or event expressed on their limitation to circumscribe their continuance, or inferred by law as bounding their extent.' 1 Washb. Real Prop. *62.

That the commissioner of the general land-office had authority to cancel the certificate of Moon, for cause, at any time before patent issued, cannot be doubted. Such powers have been constantly exercised by the land-officers of the government, and the exercise thereof sustained by the courts ever since our land system was established. We here find the limitation on the fee, or its determinable quality inferred by law, mentioned in the above definition.

In *Trulock v. Taylor*, 26 Ark. 54, such titles are termed 'inchoate legal titles.' The title of Frederick Bovee, which was established by the former judgment, was legally determined by the cancellation of Moon's certificate of entry after the former action was commenced, and the whole title became thereby vested in the United States. The patent to McLane, the present plaintiff, conveyed that title to him, and, as we have seen, he may assert it in this action."

Cornelius v. Kesacl, 58 Wis. 237, 16 N. W. Rep. 550, is quoted as holding that the commissioner had no power to cancel the final certificate. The case is imperfectly reported. There is no statement of facts, and it would seem that the entry which was canceled was a private entry, made in 1856. The court says: "The land, then, was subject to entry. It was purchased

by him and paid for. There was no fraud or mistake in the transaction. The receiver took the price of the land, and gave his receipt therefor." On such a state of facts the court of equity would seem to have had jurisdiction within the well-adjudged cases, and the commissioner could not in such case cancel the entry. It further appears from the facts stated in the opinion that the 40-acre tract in controversy was included with 80 acres of swamp lands, making the 120, the subject of the entry, all of which was canceled by the commissioner, instead of canceling the entry as to the 80 acres of swamp land; and this error, when discovered by the commissioner, was attempted to be corrected by his reinstating the entry as to this 40; but in the mean time other rights had intervened, which gave rise to the controversy. The commissioner, so far as it appears from these facts, was clearly wrong in canceling the entry as to this 40, as admitted by the commissioner himself; and the effect of the decision is to declare the invalidity of the commissioner's act in this case, and not his want of power in general to cancel a final certificate for cause; and the court clearly did not intend more by the decision, as no reference is made to *McLane v. Bovee, supra*, or other decisions of that court.

In *Franklin v. Kelley*, 2 Neb. 79, is a very interesting discussion on the right of assignment before issue of the patent. The case was determined before *Myers v. Croft*, 13 Wall. 294, had been decided. The opinion is an elaborate one, announcing the doctrine, subsequently sustained by the United States supreme court, that a deed of lands made after entry, and before issue of the patent, is valid; but as the circuit court of the United States had held such deed void, and the United States supreme court had not then passed upon the question, the learned judge covered a wide field in his discussion of the question; and one point made in the argument of the court is that the provision of the statute was designed to cut off the right of innocent purchasers, and to give the supervisory officers time to examine the rights of the entry-man before the patent issues. Says the court: "The act of 1841 provides that the entry shall be made

with the register of the land-office. The acts organizing the land department of the government provide that the action of the register shall be subject to revision and supervision by the commissioner of the general land-office; and entry with the register is dependent upon the approval of his superior, so far as the course and order of the business goes; and, without the affirmative action of the commissioner, no patent issues. It would be a great evil if a party claiming a pre-emption right could, as soon as his entry was made, convey the land to a third party, and thereby prevent the commissioner from re-examining and disapproving the entry if it was erroneously allowed. Such a course would expose the government to serious loss, and pervert a statute conceived in a wise policy and generous spirit into the means of perpetrating the greatest frauds. This is the mischief aimed at; the object was to protect the government; and in this view the language that the right secured by the act should not be assigned, is apt. As between the claimant and the government, his interest is a right merely, until the patent issues. It is subject to reinvestigation, and, on inquiry, to be disregarded by the department until the patent issues, which is treated by the government, not as a title, but as a right, or a claim of right."

This is a very clear statement of the powers and duties of the superior officers of the land department.

In *Smiley v. Sampson*, 1 Neb. 56, Judge MASON reviews all the cases in which the courts have looked into the facts in reviewing the action of the department, including *Lindsey v. Hawes*, 2 Black, 554; *Garland v. Wynn*, 20 How. 8; *Lytle v. Arkansas*, 22 How. 192; and others—and asserts that, in every one of these cases, the decision of the officers of the land department was obtained on *ex parte* affidavits, and not upon a hearing in which witnesses were examined and parol testimony taken. This case was one of the first to announce that the decisions of the land department were final upon questions of fact, and was affirmed in the supreme court of the United States. The case went up with *Johnson v. Towsley*, *supra*; and, nearly the same questions

being involved in both cases, no opinion was written in the United States supreme court in *Smiley v. Sampson*, but the opinion governing both cases was written in *Johnson v. Towsley*, *supra*.

In *Hestres v. Brennan*, 50 Cal. 211, plaintiff brought ejectment under his title from the state, and the defendants answered, alleging that they had entered the land under the pre-emption law, and presented their certificate of entry. It appears that, after entry by the pre-emptors and the issue of final certificate, the secretary of the interior canceled the certificates, and conveyed the lands to the state of California as having been selected prior to the entry by the defendants; but it does not appear that any appeal had ever been taken to the secretary; and it was contended—*First*, that the secretary had no power to cancel such entry; and, *second*, if he had such power, it would only be on appeal to him from the commissioner. But the court denied both propositions, and, in sustaining the act of the secretary in canceling the certificates, the court says: "The act of congress establishing the department of the interior confers upon the secretary the supervision of public business relating to several subjects, among which is that of public lands. The commissioner of the general land-office is vested with the authority to perform executive duties appertaining to the survey, sale, etc., of the public lands, 'under the direction of the secretary of the interior;' and the subordinate officers of the land department are subject to the supervision of the commissioner. Rev. St. U. S. §§ 441, 453, 2478. Both the secretary of the interior and the commissioner, in revising the acts of the subordinate officials of the land department, exercise supervisory rather than appellate power, in the sense in which the word 'appellate' is employed in defining the powers of courts of justice. The secretary of the interior, in the exercise of such authority, may approve, modify, or annul the acts, proceedings, and decisions of the commissioner. If, however, this power is to be regarded as an appellate power in a legal sense, it will be observed that the statute has not provided the machinery for

the taking of an appeal, and consequently that matter is subject to such rules and regulations as the department may prescribe. In this case it appears that the papers in the contest were transmitted to the secretary of the interior by the commissioner of the general land-office; and, in the absence of any showing to the contrary, it will be presumed that they were regularly and properly transmitted. We see no ground on which the decision and order of the secretary can be questioned, and, in our opinion, it definitely determines that the defendant had no legal right or title to the premises." The case, it is true, is one in which the court determines that no right of pre-emption ever existed, rather than that one once existing had been lost; yet the question determined by the secretary was one of fact, and not of law, within the decisions, and therefore final, and not open to review by the courts; and the reason of the court in sustaining the action of the secretary, in our opinion, correctly presents the extent and manner of exercising the *supervisory* jurisdiction. This case was followed in *Vance v. Kohlburg*, 50 Cal. 346, where the court admitted in evidence the cancellation of the final certificate of the commissioner, over appellant's objection, and the supreme court of California sustained the action of the court on the authority of *Hestres v. Brennan*, *supra*.

The power of the commissioner to cancel the final certificate has been determined by the Minnesota court in a number of cases, commencing with *Randall v. Edert*, 7 Minn. 450, (Gil. 359;) *Gray v. Stockton*, 8 Minn. 529, (Gil. 472;) and ending with *Judd v. Randall*, 29 N. W. Rep. 589. In the latter case the land was a commuted homestead, upon which final proof and payment had been made in November, 1878, and final receipt had been issued. The homesteader subsequently had sold the land, and thereafter, in June, 1882, and before the issue of patent, upon application and affidavits made by a third party to the commissioner of the general land-office, a hearing was ordered as to whether the final proof was fraudulent or obtained by perjury. Such hearing was had before the register and receiver, the entry was reported by them to the commissioner for

cancellation, and the receipt was ordered to be canceled by the commissioner, in February, 1883. This action of the commissioner in canceling the receipt was the only question before the court; and, in sustaining the power of the commissioner so to do, the court says: "The conclusion of the learned judge now under review, denying the right of recovery, is based upon his decision that the action of the officers of the land department, assuming to annul and cancel Andrew's entry, and the proceedings resulting in that end, were unauthorized and void. The correctness of this decision is the principal question presented before us. If we were not constrained by the considerations to which we are about to allude, it is probable that our decision would be in accordance with that under review; but, without setting forth the reasons which lead our minds towards that conclusion, we will state briefly the grounds of our decision to the contrary. It has long been the practice of the land department, in administering the various laws for the disposition of the public lands, even after final proof, and the issuing of the proper final certificate or receipt, and after the appointed proceedings with reference to making such proof have terminated, but before the issuing of the patent, to entertain proceedings anew, upon evidence produced before the commissioner of the general land-office going to show that the entry had been fraudulently made and completed, to order an investigation, and, upon proof of fraud, such entries have been canceled, [citing a large number of land-office decisions from Copp's Land Laws and Land-Owner.] This practice seems to have been sanctioned by the supreme court of the United States in *Harkness v. Underhill*, 1 Black, 316, and by this court in *Gray v. Stockton*, 8 Minn. 529, (Gil. 472.) We feel that we are compelled, by these adjudications in support of the established practice, to affirm the existence of the power in question, until the subject shall have been further considered by the supreme court of the United States, whose decisions concerning it are of paramount authority."

In *Ferry v. Street*, (Utah,) 11 Pac. Rep. 571, the court holds,

in an action of ejectment, in which the defense was that the lands, when entered, were occupied as a town-site, and were also mineral lands, that, "as to all questions of fact, the land department is called upon to consider and pass upon before issuing the patent; the judgment of this department is unassailable, except in a direct proceeding for its annulment; that among the questions the land department is called upon to consider are the character of the land, and the class to which it belongs,—whether agricultural or mineral, or whether it is within a town-site; that, if the land department had jurisdiction to grant a patent, the law conclusively presumes, in a collateral proceeding, the existence of all circumstances essential to the validity of the patent; that, unless the patent is void in view of the law of circumstances which the court may take judicial notice of, it must be held valid."

In Arizona, in *Jeffords v. Hine*, 11 Pac. Rep. 351, it was sought to defend against the patent by the party claiming a prior right, and to have a decree of title, on the ground that the receiver had acted as register and receiver both, the office of the register being vacant, and that the department holding that he was a *de facto* officer was error of law; but the court held that it was a mixed question of law and fact, which would not be disturbed by the courts.

In Kansas, *Darcy v. McCarthy*, 12 Pac. Rep. 104, is a very interesting case. Darcy originally had a homestead entry on the land in controversy, which McCarthy contested, and obtained it to be canceled, which, under the act of 1880, gave him the preference right of 30 days in which to file thereon or make entry. He availed himself of the right to enter the land as a homestead within 30 days. Subsequently, and after the expiration of the 30 days, Darcy was permitted to file a declaratory statement, alleging settlement prior to McCarthy's entry, and, under this declaratory statement, was permitted to prove up, and obtained the final receipt. McCarthy thereupon made application to the commissioner to have such receipt canceled, which was done by the commissioner, it appearing to him that

McCarthy's entry was made within the 30 days in which he had the exclusive right to enter the land. Darcy now brought ejectment, and, having offered his final receipt in evidence, McCarthy offered in evidence the cancellation of this entry by the commissioner, which was resisted upon the ground that the commissioner had no such power; but the action of the lower court, sustaining the admissibility of the evidence, and the power of the commissioner to cancel the entry, was affirmed by the supreme court in a vigorous opinion, in which, in referring to the powers of the superior officers of the land department, it says: "It is also claimed that the action of the register and receiver in allowing the cash entry of the plaintiff is conclusive on the land department, and that the commissioner has no authority to do that which his letter attempted to do. Although proof of the right to enter the land must be made to the satisfaction of the register and receiver, they are not the final arbiters of such right. They make returns of entries of land to the general land-office, which is under the charge of the commissioner. That officer has supervisory control over the subordinate officers in the land department, and can revise and correct their decisions. The entry relied on by the plaintiff was allowed by mistake, and without authority of law, and it was clearly competent for the commissioner to cancel and set it aside. It is argued for plaintiff, under section 383 of the Code, his duplicate receipt is proof of title against all but the holder of the actual patent, which is not in the hands of the defendant. This is a rule of evidence prescribed by the Code, and is applicable in a controversy between citizens where the duplicate receipt is held with the concurrence of the United States authorities. The title to the public lands belongs to the United States, and congress is given full authority to dispose of the lands, and to make all needful rules and regulations respecting the same. Section 3, art. 4, Const. U. S. The land department has been created by congress, and rules prescribed for the disposal of the public lands; and to the officers of that department the duty of selling and disposing of the lands is committed. They can only

sell or dispose of those lands in the manner prescribed by congress. In disposing of them, there are doubtless many mistakes made; but the matter is within the control of the land department until the patent issues, and the mistakes may be corrected by the officers of that department. The entry of the plaintiff, having been made without authority, was rightfully canceled and set aside by the commissioner, and the effect of the duplicate receipt as evidence of title was destroyed. It being within the scope of the duties of the commissioner to make the correction and cancel the erroneous entry, it will be presumed, in the absence of evidence to the contrary, that it was done in accordance with the rules governing such action, and upon sufficient evidence. His action left the whole matter before the land department of the government for adjustment, where the rights of the parties could be further contested, and an appeal from the decision of the commissioner could be taken to the secretary of the interior. Whatever may be the *status* of the controversy between the parties there, it is plain, from the evidence in the record here, that the plaintiff was not entitled to recover."

In Washington Territory, in *Hays v. Barker*, 3 Pac. Rep. 901, the action was ejectment, and the defendant was not allowed to prove that the certificate relied upon to maintain plaintiff's action had been canceled. This the supreme court held was error, and also announced the doctrine, contained in the decisions of the supreme court of the United States, "that it appeared from the record of the case that proceedings were then pending before the land department, and that the courts would not take jurisdiction of the case until the matter was finally terminated by the issue of the patent," and judgment was reversed.

In *Forbes v. Driscoll*, 81 N. W. Rep. 638, this court held that it would not interfere to determine questions which involve the pre-emption right between settlers; that congress has established a tribunal to decide all questions of fact that arise in determining to whom the government will sell or dispose of its land; and that, prior to the issuing of the patent, the courts will not

interfere to review its acts, or prejudice the correctness of its rulings. The case was one in which Forbes had entered upon a quarter section of public land, filed his declaratory statement at the Deadwood land-office, and had made some improvements, but had subsequently abandoned the land, as claimed by Driscoll, who thereupon filed his declaratory statement, entered upon a part of the same quarter section outside of the inclosure and improvements of Forbes, and erected a dwelling-house, broke up a portion of the land, and resided thereon, and made it his home. Forbes brought a possessory action, under the statute, to eject Driscoll from the entire quarter section, and recovered judgment in the court below; but the supreme court reversed the case, holding that while the action might have been maintained, under the statute, by Forbes, to obtain such portion of the premises as had been inclosed and cultivated by him, and from which he had been ousted by Driscoll, if such were the fact, yet, Driscoll having entered, and made improvements upon that portion of the land which was unoccupied and unimproved, the judgment ousting him therefrom was in excess of the court's jurisdiction, a determination of mere pre-emption rights, and therefore void. And, in rendering its decision, the court makes use of the following pertinent language: "From these decisions of the supreme court it would seem to be settled that courts of law can in no case review the action of the land department, after it has acted, by declaring, in effect, its acts illegal and void; and that courts of equity are powerless to act until the jurisdiction of the department has ceased by the issue of the patent; and that, when the jurisdiction of the court of equity is invoked, the error complained of must come clearly within the well-known grounds of equity jurisdiction. * * * A contrary view of the law would bring the courts and land-offices into constant collision. A decision of the courts in advance would take from these offices the jurisdiction the law has given them to hear and determine 'all rights of pre-emption arising between different settlers.' It would bring into the courts for decision all claims and contests before the department, and the absurd

result would be reached, as we are informed by briefs of counsel has in fact resulted in this case, to-wit, that the plaintiff, Forbes, has judgment in the district court of the territory awarding him the possession of the entire quarter section, while the defendant, Driscoll, has the decision of the land department, entered since the trial of this case, awarding him the patent, and consequent right to the possession, of the same premises."

We have examined Judge DEADY's opinion in *Smith v. Ewing*, 23 Fed. Rep. 741, in which he arrives at a different conclusion from that reached by us; and, in so far as the opinion denies the authority of the commissioner, under the direction of the secretary of the interior, to cancel the final receipt once issued, the decision stands alone, and is unsupported by the authorities cited by the learned judge.

The power of supervision given the secretary and commissioner is a general one,—a supervision over all the acts of the register and receiver. There is no exception made in the matter of the issuing of final certificates; and if the position here contended for be the correct one, to-wit, that the commissioner must issue a patent at once upon the presentation of the certificate, and that the issue of the certificate concludes all inquiry into matters settled by its issue, then it concludes all supervision by the superior officers; and on that reasoning the patent might as well issue by the local as by the supervisory officers. We are led to adopt the contrary of this reasoning. In our judgment, the secretary of the interior, and, "under his direction," the commissioner of the general land-office, is "charged with the supervision of the public lands" for the very purpose of preventing frauds, mistakes, and errors in the disposition of such lands by the local officers; and when such officers have committed errors or mistakes, or have been imposed upon by fraud, the entire case may be re-examined upon appeal, or so far supervised, in the usual course of transmission through the department, as to expose and correct such errors or frauds, to the end that the patent may issue to the pre-emptor honestly entitled to it under the law. Any other rule would make the "right of pre-emp-

tion, arising between different settlers," to be determined by the courts, instead of the register and receiver, as provided by statute, in a large class of pre-emption cases. It is no answer to say that fraud is a question for the courts, that its determination is judicial in its character, and that such power cannot be exercised by the executive department. The determination of "the right of pre-emption arising between different settlers," and the weighing and considering testimony as to settlement, etc., upon which such right depends, is essentially judicial in its character; yet no one doubts the right of congress to confer such powers upon a branch of the executive department. No *private rights* intervene so long as the title, legal and equitable, remain in the government, or while such title may be held as derived from the government through fraud or mistake; and the department in these cases only pass upon the questions of fraud or mistake so far as to determine whether it—the department—will re-examine or reopen the case already determined. It does not seek to adjudicate upon the fraud or mistake, alleged as such, between *private parties*. The case made is a *prima facie* one in practice,—a petition for a review of the former decision, upon *ex parte* showing of fraud or mistake as against the *government*; and while the case is pending in the department, and before patent issues, the secretary, and, under his direction, the commissioner, ought to have, and, in our judgment, they clearly have, such power of re-examination and readjudication in a proper way, under the pre-emption act of 1841 and the amendments thereto. We are clearly of the opinion that the supervisory and appellate powers vested in the secretary of the interior, and the commissioner of the general land-office under his direction, give them the right to examine all acts of the register and receiver. In matters of fact left to the determination of the local officers, the jurisdiction of the secretary and commissioner may be exercised by appeal and a re-examination of the facts themselves, or by examination of their action, and requiring them again to examine the question of fact involved; and in all

cases they may *supervise* the purely administrative or executive acts of the local officers.

We are led, then, to the conclusion that, prior to the issuance of the patent, the plaintiff cannot maintain this action. This court cannot know but that the department may issue to him, instead of the defendant, a patent for the premises in controversy; and if his claim is just and right, (a question upon which this court does not pass,) the law presumes he will obtain a patent, upon the ground that all officers are presumed to act justly, and to do their duty.

In this opinion we have studiously avoided intimating what may be the rights of the plaintiff under any other form of action. It is sufficient for this case that this action cannot be maintained, for the reasons given. The judgment must be reversed, and the case remanded, with instructions to dismiss the complaint.

All the justices concur.

UNITED STATES, Defendant in Error, v. GUNTHER, Plaintiff in Error.

1. Mayhem—Premeditation not Necessary—Evidence—Instructions.

Under R. S. U. S. § 5348, against malicious mayhem, it is not necessary to prove premeditated design in order to constitute the offense, and a request to charge that, in order to convict, the jury must find that at the time the defendant did the act he had a premeditated design or intention to do it, was properly refused.

2. Same—Indictment—Sufficiency.

An indictment, under R. S. U. S. § 5348, against mayhem, which charges the offense in the language of the statute, is sufficient. It need not state, "that by reason and means of the facts alleged therein said prosecutor was maimed and disfigured."

(Argued February 15, 1888; reversed February 15; opinion filed May 10, 1888.)

Error to district court, Sixth judicial district; Hon. W. H. FRANCIS, Judge.

J. C. Hollembaek, for plaintiff in error.

The uncontradicted testimony in the case shows that on the 22d day of September, 1886, the defendant was first sergeant of troop D, Seventh United States Cavalry, stationed at Fort Yates; that the complainant was at the same time a private in said troop; that on said 22d of September, defendant received orders to arrest the complainant, and confine him for an infraction of military rules; that he went to complainant's quarters for the purpose of arresting him in obedience to said orders; that complainant disobeyed the defendant's orders, and resisted his attempt to arrest him; that an affray then and there occurred between complainant and defendant; during which the complainant received injuries which resulted in the loss of his left eye.

The evidence in the case fails utterly to show that the defendant intended or designed to strike or kick complainant in his eye, or that he threatened, designed, or intended to put out the complainant's eye, or to maim or disfigure him; but the uncontradicted evidence in the case does show that the defendant did not, in striking complainant, aim at his eye, or any particular part of his person.

The uncontradicted testimony shows conclusively that when the defendant went to the complainant's quarters to arrest and confine him, he was acting in obedience to orders, and in the strict line of his duty.

It is manifest, from a consideration of all the testimony in the case, that the above claim is fully warranted; and the fact that defendant was, at the time he sought the complainant in his quarters, acting not only within the line of his duty but in obedience to the imperative requirements of orders delivered to him by competent superior authority, rebuts any presumptions that may be invoked that he was a trespasser upon the rights of com-

plainant, or that he therefore became liable for the consequences flowing from such unlawful invasion.

Conceding that defendant went to complainant's quarters for a lawful and proper purpose, and that he was authorized to make such visit, the question finally presented upon this branch of the case is whether he, (defendant,) being lawfully there, formed any design or intent to maim or disfigure complainant.

We insist that, not only is the case barren of facts warranting such conclusion, but it affirmatively appears on the part of the defendant that no such purpose, design, or intent existed at the time he struck the complainant.

We concede the assault, but we deny that a presumption exists that defendant contemplated the consequences that resulted from the act of striking the complainant, if, indeed, the loss of the eye did in fact result from the blow given.

The most that could in any case be presumed would be that defendant contemplated the *probable* consequences that would result from his act. Can it be fairly claimed that the *probable* consequence of a blow delivered by a party in a sudden affray or combat would be the destruction of an eye?

Again, conceding that defendant believed that a blow, similar to the one delivered by him, *might* have the effect of destroying the eye, yet an examination of the testimony will fail to disclose or establish the fact that, when defendant struck the blow, he intended or contemplated any specific injury to any part or organ, and certainly not to the eye.

"In estimating the prisoner's real intention, it is obviously of importance to consider the nature of the instrument used, and the part of the body on which the wound was inflicted, according to the plain and fundamental rule that a man's motives and intentions are to be inferred from the means which he uses, and the acts which he does." 2 Starkie, Evidence, 691.

The essential element of the crime of mayhem, is an intent to maim or disfigure. The mere fact of maiming or disfigurement raises no presumption of an intent to maim or disfigure,

but proof of a specific design to maim or disfigure must be adduced.

We insist that to warrant a conviction in this case the jury should have been instructed that they must be satisfied from the evidence in the case that defendant, at some time before the actual infliction of the alleged injury, had formed a specific design to maim or disfigure the complainant. 1 Russ. Cr. 735.

We concede that the claim that defendant intended to inflict some injury upon Kemble would be sustained by proof of the fact that he struck him, but we deny that mere proof of striking—even to the extent claimed by the prosecution—warrants a presumption that defendant intended the specific injury that resulted.

Such specific injury would not be the natural result of the act of striking. *State v. Bloodow*, 45 Wis. 279, 1 Whart. Cr. Law, 170.

The language of section 5348, R. S., "with intent to maim," etc., is synonymous with the words, "premeditated design." *Foster v. People*, 50 N. Y. 598; *Godfrey v. People*, 63 N. Y. 207.

John E. Carland, U. S. Atty.

The assignments with reference to the evidence showing no premeditation and the refusal of the court to instruct as to it, may be considered together, as they involve the same question,—whether by the terms of the statute on which this indictment is found there must be a premeditated design to inflict the particular injury charged against the defendant in order to constitute the crime. Although mayhem was a crime at common law, it must be conceded that the statute in question contains a full definition of the crime therein denounced, and, so far as crimes against the United States are concerned, it must be taken as a definition of the crime of mayhem in the same manner that the statute of 22 & 23 Charles II. C. I., commonly called the "Coventry Act," was considered to have defined what had theretofore been, and thereafter should be, mayhem. The last-named act recites that on the 21st of December, 1670, "a

violent and inhuman attempt was made upon the person of Sir John Coventry, * * * and upon the person of his servant, William Wylkes, by a considerable number of armed men." The act then goes on and outlaws the persons indicted for the offense, which seems to have been robbery, and then enacts that it shall be felony, without benefit of clergy, "of *malice aforethought*, and by *lying in wait*, to unlawfully cut out or disable the tongue, put out an eye, slit the nose, or cut off or disable any limb or member of any subject of his majesty, with intention in so doing to maim or disfigure in any of the manners before mentioned such, his majesty's subject." 2 Bl. Com. (Coolsey's Ed.) 206.

This act remained in force until it was repealed and re-enacted by 9 Geo. 4, c. 31, (1828,) which was itself repealed and re-enacted by 24 & 25 Vict. c. 100, (1861,) which is still in force. The law in regard to mayhem in the last-mentioned act appears therein as section 18, and, so far as mayhem is concerned, is as follows :

"Whosoever shall *unlawfully and maliciously*, by any means whatsoever, wound or cause any grievous bodily harm to any person, or shoot at any person, or by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, with intent in any of the cases aforesaid to maim, disfigure, or disable any person," etc., "shall," etc.

By section 18 of the act of congress approved April 30, 1790, it is provided that if any person or persons within the places therein mentioned, "*on purpose and of malice aforethought* shall unlawfully cut off the ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off the nose or a lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person in any of the manners before mentioned, shall," etc. 1 St. at Large, p. 115.

This statute continued to be the law on the subject until the statutes of the United States were revised in 1873, when the foregoing section was revised and amended, and now appears

as section 5348, U. S. R. S., upon which the indictment in this action was found. The crime defined by the section last mentioned is exactly the same as in the act of 1790, with the exception that the words "on purpose and of malice aforethought" are eliminated from the law, and the word "maliciously" substituted. Is it not, then, an inevitable conclusion that the legislative authority of England and the United States intended and did so change the law as to eliminate from it the necessity of proving a premeditated design to inflict the particular injury charged? The word "maliciously" as used in criminal statutes of the kind under consideration, means nothing more than that the act was done voluntarily, intentionally, and without justifiable or excusable cause. The import of the words "malice" and "maliciously" is declared by section 772, Penal Code of Dakota, to be "a wish to vex, annoy, or injure another person, established by proof or presumption of law." In the case of *State v. Bloedow*, 45 Wis. 280, cited by counsel for plaintiff in error, it is said: "If, as has happened to the disgrace of humanity, one engaged in a fight gouge out his adversary's eye, the act, unexplained by circumstances, may be sufficient proof of the malicious intent to maim." In the case of *Godfrey v. People*, 68 N. Y. 207, cited by counsel as supporting his theory, the indictment was found on a statute of New York in the following words: "Every person who from *premeditated design, evinced by lying in wait for the purpose*, shall," etc., "or disable any limb or member of another on purpose." 2 Rev. St. 664, § 27.

It is not difficult to account for a decision on that statute holding that a premeditated design must exist in order to complete the offense. The above section is not now the law of New York. The law now stands as follows: "A person who willfully, with intent to commit a felony, or to injure, disfigure, or disable, shall." Under this statute the intent may be presumed from the infliction of the injury. *State v. Hair*, 34 N. W. Rep. 893; *State v. Jones*, 70 Iowa, 505, 30 N. W. Rep. 750; *Davis v. State*, 2 S. W. Rep. 630.

There was sufficient evidence to go to the jury on the question of intent, and they have found that it existed. If the defendant intentionally put out the eye of Kemble, and the jury find that he did, then it follows that he did it with intent to maim or disfigure; for no one will claim that, if a person intentionally puts out the eye of another, he did not intend to maim or disfigure. *State v. Clark*, 69 Iowa, 537, 28 N. W. Rep. 537; *State v. Simmons*, 3 Ala. 497.

The statute on which the indictment is found defines the crime therein denounced fully, and the indictment, having used its language, is sufficient. *State v. Briley*, 8 Port. (Ala.) 491.

THOMAS, J. The plaintiff in error, Herman Gunther, was indicted at a term of the district court of the Sixth judicial district of the territory of Dakota, having and exercising the jurisdiction of the circuit and district courts of the United States, held at Bismarck in March, 1887, for having, on the 26th day of October, 1886, at the military post of Fort Yates, maliciously put out the left eye of one Edmund Kemble, with intent to maim and disfigure him, (the said Kemble.)

The defendant entered a plea to this indictment of not guilty, and at a term of the United States district court held at Bismarck in September, 1887, the cause came on for trial, and resulted in a verdict of guilty. In due time a motion was made for a new trial, which was overruled. Defendant then moved in arrest of judgment, which motion was also denied, and judgment was thereupon pronounced by the court. The case is here on writ of error, and defendant asks that the judgment of the said district court be reversed for the following reasons, to-wit:

1. The judgment ought to be reversed because the court refused to charge the jury that, in order to convict, they must find that the defendant at the time he inflicted the injury charged in the indictment had a premeditated design or intent to put out the eye of said Kemble, with intent to maim and disfigure him.

2. The judgment ought to be reversed because there was no evidence introduced at the trial tending to show premeditated

design on the part of the defendant to put out the eye of said Kemble, with intent to maim and disfigure him.

3. The judgment should be reversed because the indictment did not state that by reason and means of the facts therein alleged said Kemble was maimed and disfigured.

It will be observed that assignments of error 1 and 2 virtually raise the same issue, and we shall therefore consider them together.

The question presented by them for consideration is whether, by the terms of the United States statute on which the indictment in this case is based, it is necessary to prove premeditated design in order to establish the crime of mayhem as it is defined in said statute.

That such would have been the case at common law, or under the statute of 22 and 23 Charles II., commonly known as the "Coventry Act," there can be no doubt, because by the terms of said statute premeditated design in the infliction of such an injury is made the essence of the crime. 2 Bl. Comm. (Cooley's Ed.) 206. This statute, with some immaterial modifications, was adopted by the congress of the United States April 30, 1790, and continued in force until the revision of the United States Statutes in 1873, when it was materially amended.

By section 13 of the act of 1790 it was provided that if any person or persons within the places therein mentioned, "*on purpose and of malice aforethought*," shall unlawfully cut off the ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off the nose, or lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person, in any of the manners before mentioned, shall," etc. 1 St. at Large, p. 115.

In the revision of this statute in 1873, (section 5348, Rev. St. U. S.,) under which the indictment was found, the words "*on purpose and of malice aforethought*" were eliminated, and the word "maliciously" substituted.

It seems evident that congress in amending this act by expunging the words "*on purpose and of malice aforethought*,"

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and inserting in their stead the word "maliciously," intended to change the *gravamen* of this offense, and that it should no longer be necessary to establish premeditated design in order to constitute this crime.

The word "maliciously," as used in criminal statutes of similar import to the one under consideration, in our judgment means nothing more than that the act should be done voluntarily, intentionally, unlawfully, and without excuse or justification, and, if committed in this manner, would most certainly constitute the offense of mayhem within the meaning of this statute.

It is therefore, in our judgment, wholly immaterial whether it was done with premeditated design or not.

Hence we conclude that the judge of the district court properly refused to charge the jury that they must so find in order to convict the defendant; and it therefore follows, as a matter of course, that it was also immaterial whether there was any evidence at the trial tending to show this fact.

The question of malice is one for the jury, and may be inferred or established by the circumstances under which the injury was inflicted, and may be formed previous to or at the time the act was done.

In order for the jury to return a verdict of guilty, they should have found from the evidence three facts:

1. That the defendant did put out the eye of said Kemble.
2. That it was done maliciously.
3. Done with intent to maim and disfigure him. *State v. Hair*, 34 N. W. Rep. 893; *State v. Jones*, 70 Iowa, 505, 30 N. W. Rep. 750; *Davis v. State*, 22 Tex. App. 45, 2 S. W. Rep. 630.

If there were any evidence introduced at the trial substantially tending to prove these facts, or from which the jury would be justified in inferring them, the verdict cannot be said to be erroneous.

In the case of *State v. Bloedow*, 44 Wis. 280, cited by counsel for plaintiff in error, the court say: "If, as has happened, to the disgrace of humanity, one engaged in a fight gouge out

his adversary's eye, the act, unexplained by circumstances, may be sufficient proof of the malicious intent to maim."

We concede that there may be cases where a person's eye is put out by an act of another which could not have been expected by any reasonable person to have resulted from such act, and proof of intent to bring about such a result, independent of the commission of the act itself, would be necessary in order to establish the offense; but in the case at bar there are circumstances proven from which it might be reasonably inferred that the defendant not only inflicted the injury maliciously, but with the specific intention to maim and disfigure the person injured. This question having been properly submitted to the jury, under the charge of the court, they having found that these ingredients existed, we cannot reverse the conviction on any of these grounds. *State v. Clark*, 69 Iowa, 196, 28 N. W. Rep. 537; *State v. Simmons*, 3 Ala. 497; *Com. v. Newell*, 7 Mass. 245.

It is a familiar elementary principle of law that every person is presumed, and must be held, to have intended the natural and probable result of his voluntary acts; and the jury probably, as they had the right to do, took this view of the case in considering all the circumstances surrounding the commission of the offense.

In this case the court instructed the jury that "they must believe from the evidence beyond a reasonable doubt that the defendant at the time of putting out Kemble's eye intended and designed to commit the crime of mayhem by putting out said Kemble's eye, with intent to disfigure and maim him." Having examined carefully the entire charge of the court in this case, we discover no error therein.

The third assignment of error puts in issue the sufficiency of the indictment for the reason that it does not state "that by reason and means of the facts alleged therein said Kemble was maimed and disfigured." The indictment followed the language of the statute, which fully defines and describes the crime therein denounced, and in our judgment is sufficient. The indictment clearly states and charges that the defendant put out the eye of

said Kemble, and that it was done maliciously, and with intent to maim and disfigure him. The proof of these facts would be sufficient to establish the offense, and we cannot see any reason why the indictment should be required to state more. 2 Bish. Crim. Proc. § 856; *State v. Briley*, 8 Port. (Ala.) 472; *Tully v. People*, 67 N. Y. 15. The judgment is in all things affirmed.

All the justices concurring.

TERRITORY OF DAKOTA, Defendant in Error, v. KEYES, Plaintiff in Error.

1. Rape, Assault with Intent to—Indictment—Sufficiency.

An indictment for assault with intent to rape, charging that K., in and upon one M., did make an assault, and her, the said M., did then and there beat and ill-treat, with the intent to commit the crime of rape upon her, the said M., she, the said M., then being a female under the age of 10 years, *held* sufficient.

2. Same.

In the case of an indictment for an assault with intent to rape a child under the age of consent, it is not necessary to allege that it was done without her consent, and in such case, the assault being charged, force is implied.

3. Same—Sufficiency of Evidence.

On the trial of an indictment for an assault with intent to rape a child of tender years, it appeared to have been done at the house of the defendant, when they were alone; that all of the facts relating to it were testified to by her; that she was corroborated by a statement of the occurrence made immediately thereafter to the mother, who saw her coming from the house; this being all of the testimony as to the offense, (the defendant not testifying,) and the same having been submitted to the jury on a proper charge, *held*, the court would not disturb the verdict.

4. Testimony not Objected to—Review.

The appellate court will not consider the question of the admissibility of testimony to which no exception has been taken.

5. Rape, Assault with Intent to—Consent, when Immaterial.

In the case of an assault with intent to rape a child under the age of consent, evidence as to consent is immaterial.

6. Same—Impotency no Defense.

Impotency is no defense to an assault with intent to commit a rape.

7. Instructions.

The court charged the jury: "Should this court make errors, it will not only be ready this to correct, but there stands a higher court above that will protect the rights of the defendant." *Held* not error. FRANCHIS, J., dissenting.

(Argued May 16, 1887; reversed, May 26: opinion filed May 22, 1888.)

Error to the district court of Davison county; Hon. BARTLETT TRIPP, Judge.

G. L. Faust, for plaintiff in error.

All of the elements of the offense, and the means to effect the crime, must be charged. The use of the word "rape" is not sufficient. 5 *Crim. Law Mag.* 610; 2 *Bish. Crim. Proc.* 82, 976, n.; *Bish. Div. & F.* 803; 1 *Russ.* (7th Ed.) 693, 697.

The proof must show that the defendant intended to use force to the extent of rape. *Stephen v. State*, 8 N. E. Rep. 94; 1 *Bish. Crim. Law*, 203, 733; 2 *Bish. Crim. Law*, 979; 4 *Crim. Law Mag.* 274; *Sanford v. State*, 12 *Tex. App.* 125; *Sadler v. State*, 12 *Tex. App.* 194; *Smith v. State*, 80 *Amer. Dec.* 367, n.; *Lawson*, *Pres. Ev.* 271, 272, 274; *Best*, *Ev.* 728. The court erred in its instruction with reference to consent. *Smith v. State*, *supra*; 8 N. E. Rep. *supra*; *Bish. St. Crimes*, 946; *Desty*, *Crim. Law*, 33, note 2; *May*, *Crim. Law*, 56; 19 *Amer. Law Rev.* 833; *O'Mera v. State*, 17 *Ohio St.* 518; *Knapp v. Thomas*, 39 *Ohio St.* 385; *State v. Pickett*, 11 *Nev.* 255; *Mitchell v. Com.* 78 *Ky.* 205; *Pollard v. State*, 2 *Ia.* 567.

The court's instructions with reference to impotency would force the defendant to testify to his knowledge of his condition. The court erred in its charge with reference to errors made by it. *Hill. New Trial*, 289.

The statements made to the mother ought to have been excluded. 2 *Bish. Crim. Proc.* 960, 962; 5 *Crim. Law Mag.* 610.

C. F. Templeton, Atty. Gen., and *J. L. Hannett*, for defendant in error.

The first point made is that the indictment does not charge a public offense.

It is not necessary to set out in an indictment more than the ultimate facts required to be proven. Tested by this rule, the indictment was clearly good. It was not necessary to allege that the assault was without the consent of the prosecuting witness, for the reason that she was under 10 years of age, and, in law, could not consent. It was not necessary to allege that the act was done with force, for the assault being charged, and the female being under 10 years of age, *force* is necessarily implied. See cases cited below.

The second ground for reversal urged by counsel is that the evidence does not show an *intention* on the part of accused to commit rape. The acts of defendant constituting the assault were before the jury, and were sufficient to justify the jury in finding a criminal intent. The general verdict was a necessary finding upon this point.

Evidence of intent is always presumptive from facts proven, except when accused testifies in his own behalf or has made confession to others.

The third assignment of error raises the question as to the correctness of the court's charge to the jury upon the subject of consent.

The court instructed the jury that, if the defendant attempted to have carnal intercourse with the prosecuting witness, he would be guilty of the crime charged in the indictment, even though she consent.

On this point the courts are not in harmony, but we believe the instruction to be sustained by the better line of authority. *Hays v. People*, 1 Hill, 351; *Singer v. People*, 13 Hun, 418; *State v. Johnson*, 76 N. C. 209; *Oliver v. State*, 45 N. J. Law, 46; *Fri-zell v. State*, 25 Wis. 369; *People v. McDonald*, 9 Mich. 150; *Mayo v. State*, 7 Tex. App. 342; *Com. v. Rooswell*, 8 N. E. Rep.

747; *People v. Gordon*, 11 Pac. Rep. 762; Whart. Crim. Law, (8th Ed.) § 577.

The cases in this country holding the opposite doctrine, are: *Smith v. State*, 12 Ohio St. 466; *Stephens v. State*, 8 N. E. Rep. 94; *State v. Pickett*, 11 Nev. 255; *Garrison v. People*, 6 Neb. 274.

The next point involves the correctness of the court's charge to the jury upon the subject of impotency.

As to this there is a conflict between the English and American authorities, the English cases holding that impotency is a valid defense to a charge of assault with intent to rape. The American courts and writers hold that the rule laid down by the court is the better doctrine.

The essence of the crime is the outrage of the person and feelings of the female. P. C. § 322. The feelings of a woman may be outraged by the force and brutality of a man who is impotent as well as a man who is not.

An assault, as defined by our laws, does not imply an ability to consummate the attempted act. P. C. § 305.

Impotency is therefore no defense. *Com. v. Greer*, 2 Pick. 380; Barb. Crim. Law, 114; 1 Whart. Crim. Law, (8th Ed.) 184, 552; 1 Bish. Crim. Law, 737, 742, 752; 2 Bish. Crim. Law, 32.

As regards other crimes, it has been frequently held that inability to accomplish the principal crime is no defense to an indictment for an attempt. *Kunkle v. State*, 32 Ind. 231.

The court did not err in its charge with reference to there being a higher court that would protect the rights of the defendant. *U. S. v. Adams*, 2 Dak. 305.

McCONNELL, J. The defendant in the court below was tried and convicted under an indictment charging him with the crime of assault with intent to rape a female child under the age of 10 years. Motions for a new trial and in arrest of judgment were made and overruled, and the defendant was sentenced to the penitentiary for the term of three years and six months. The defendant brings the case to this court for review upon a writ of

error, and makes several assignments of error. We will consider each in the order presented.

1. It is urged that the indictment is not sufficient to charge a public offense. The material part of the indictment complained of, is as follows: "That Edwin H. Keyes, * * * in and upon one Ruby Milliken, then and there being, did make an assault, and her, the said Ruby Milliken, did then and there beat and ill-treat, with intent to commit the felony of rape upon her, the said Ruby Milliken, she, the said Ruby Milliken, then being a female under the age of ten years."

The defendant's counsel contends, citing several authorities, that an indictment for an assault with intent to commit rape is fatally defective unless it sets out the intended means to effect the crime, to-wit, force, threats, or fraud; that in such cases the use of the word "rape" is not sufficient; that all the elements of the intended offense must be charged.

We think, however, that the indictment is sufficient. It was not necessary to allege that the assault was without the consent of the prosecuting witness, for the reason she was under the age of 10 years, and in law could not consent. It was not necessary to allege that the act was done with force, for, the assault being charged, and the female being under the age of 10 years, force is necessarily implied. It is not necessary to set out in an indictment more than the ultimate facts required to be proven. Tested by this rule, the indictment is clearly good. Sections 223, 498, 537, Crim. Pro. Dak.; *Singer v. People*, 13 Hun, 418; *Com. v. Sugland*, 4 Gray, 7; *Com. v. Fogarty*, 8 Gray, 489; *Fizell v. State*, 25 Wis. 364.

2. It is next urged that the evidence does not show an intention on the part of the accused to commit rape. We have examined the evidence, and think that it justified the verdict.

The acts of the defendant constituting the assault were before the jury, and, a proper charge from the court having been given, the general verdict was a necessary finding upon this point. The only witnesses for the prosecution were Ruby Milliken, the prosecuting witness, and Alice Milliken, her mother,

corroborating her by the girl's statement made to her immediately after the assault, and the further fact that she saw the girl coming from the defendant's house; the defendant being at the time in the house alone. The only witness for the defense was Dr. Andros, upon the question of defendant's impotency. The defendant did not avail himself of his privilege of becoming a witness.

3. It is next urged that the trial court erred in allowing Alice Milliken to testify as follows: "*Question*. Did your daughter tell you after she had been at Mr. Keyes' that Mr. Keyes had taken her upon his lap? What, if anything, did your daughter tell you in reference to what was done? *Answer*. She told me as soon as she got home that Mr. Keyes took her into the house, took her upon his lap, unbuttoned her drawers and his pants, and put his privates with hers." She also testified that her daughter was but nine years of age.

This is one of the assignments of error, and is pressed upon us in the brief of defendant's counsel. In looking at the transcript we find that this question was allowed, and the answer was given, without objection. Neither was there any motion to strike such testimony from the record. No exception was saved, and we therefore shall not pass upon the question as to the admissibility of such testimony.

While it has been held that such testimony is inadmissible, yet our attention has been called to the following authorities holding that such testimony is proper, especially where the injured party is a girl of tender years. "The particulars of the statements made by the complainant witness cannot be given in evidence, except in a case where the person ravished is very young." *Hannon v. State*, (Wis.) 36 N. W. Rep. 1; *People v. Gage*, (Mich.) 28 N. W. Rep. 835; *State v. De Wolf*, 8 Conn. 93; *State v. Byrne*, 47 Conn. 465; *Phillips v. State*, 9 Humph. 246; *State v. Mitchell*, 89 N. C. 521.

4, 5. It is next urged that the court erred in not allowing Ruby Milliken, the prosecuting witness, to answer the following question, put to her by the defendant's counsel: "Did you stay

with Mr. Keyes that time because you wanted to?" We will consider this in connection with the fifth assignment of error, relating to the charge of the court upon the question of consent. The charge of the court complained of is as follows: "This defendant stands charged in this court of the crime of assault with intent to commit rape. The indictment charges that the age of the child upon whom this assault is alleged to have been committed, is under the age of ten years. This is an essential allegation of the indictment, because, under the wise provision of law which is enacted for the benefit of society and mankind, no child under the age of ten years is in law capable of giving consent. A man who has intercourse or attempted intercourse with a child under the age of ten years, which may be so far perfected that there is the slightest penetration, is guilty of rape in the first degree. A man who intends to have any carnal connection with a child under the age of ten years, and does any act towards that sufficient to make an assault, is guilty of an assault with intent to commit rape, even though the child consents. There can be no consent in law. You will readily understand the wise provision of such a law. In this case I charge you that, if you find that this defendant attempted intercourse with this child, even though she consent, he is guilty of an assault with an attempt to commit a rape, under the statute."

The question here involved has frequently been before the courts both of England and this country, and, while the English courts have almost uniformly held that consent is no defense to the substantive crime when the child is under the age of 10 years, it must be conceded that those courts, prior to act of parliament in 1880, almost invariably held that consent of such child is a good defense to the charge of assault with intent to commit the crime. As to the principal crime the decisions of the courts of this country are in harmony with those of England, but as to the incipient crime there is a decided conflict. The difference of opinion in the courts upon this point has arisen from the different answers given by the respective courts to the following question: Can there be an assault, *as a matter of law,*

when there is formal consent, and the substantive crime is not accomplished? When it is remembered that the completed offense is but a continuation or aggravation of the *felonious assault in law*, and it being conceded by all that, when accomplished, the child's consent does not eradicate the *assault in law*, by what principle of law, logic, or reasoning can it be maintained that such consent eradicates the *assault in law*, as to the incipient crime? Though the child formally and apparently consent, nay, even though she solicit the act, yet in reality and in law it is no consent. Therefore we think that the trial court was right in excluding the evidence as to whether or not the child consented, and that there was no error in the charge to the jury upon the question of consent. *Hays v. People*, 1 Hill, 351; *Singer v. People*, 13 Hun, 418; *State v. Johnson*, 76 N. C. 209; *Oliver v. State*, 54 N. J. Law, 46; *Fizell v. State*, 25 Wis. 369; *People v. McDonald*, 9 Mich. 150; *Mayo v. State*, 7 Tex. App. 342; *Com. v. Roosenell*, (Mass.) 8 N. E. Rep. 747; *People v. Gordon*, (Cal.) 11 Pac. Rep. 762; Whart. Crim. Law, (8th Ed.) § 577.

The cases in this country in conflict with this doctrine are: *Smith v. State*, 12 Ohio St. 466; *Stephens v. State*, (Ind.) 8 N. E. Rep. 94; *State v. Pickett*, 11 Nev. 255; *Garrison v. People*, 6 Neb. 274. Also, Bish. St. Crim. §§ 498, 499.

In *Smith v. State*, *supra*, Judge PUCK says: "Two things must concur to authorize a conviction under the 17th section: there must have been an assault, coupled with an intent to commit a rape upon the person assaulted. An assault implies force upon one side, and repulsion, or at least want of assent, upon the other. An assault, therefore, upon a consenting party, would seem to be a legal absurdity." In that case Judge BRINKERHOFF dissented, on the ground of the reasoning of the court in *Hays v. People*, *supra*. In *Stephens v. State*, *supra*, Judge NIBLACK says: "The question as to whether a female child under the age which disqualifies her from assenting to sexual intercourse may so far consent to the taking of improper and indecent liberties with her person as to relieve such liberties of

their unlawful and indictable character, is one which has received some attention both in England and in this country, but is a subject upon which the authorities are not numerous, and are very considerably in conflict. But the difference between the statutes or systems of jurisprudence upon which some of the decided cases rest is sufficient to account for the conflicting conclusions respectively reached by them." In that case Judge ELLIOTT dissented.

6. The next point urged by counsel for plaintiff in error is as to the court's charge to the jury upon the subject of impotency. That part of the charge complained of is as follows: "I charge you as a matter of law that impotency in a case of this kind—that is, an assault to commit rape—is no defense, at least unless it be coupled with the further proof that the defendant himself knew of that impotency; then it might be admissible in evidence to go to the question of intent, but no further." As to the correctness of the rule of law as stated in this instruction, there is a conflict in the authorities; some of them holding that impotency is a valid defense to a charge of an assault with intent to commit the crime of rape. We think, however, that the rule as stated in this instruction is the better doctrine.

The essence of the crime is the outrage of the person and feelings of the female. The feelings of a woman may be outraged by the force and brutality of a man who is impotent as well as of a man who is not. "The essential guilt of rape consists in the outrage of the person and feelings of the female. * * *" Section 322, Pen. Code Dak. "An assault is any willful and unlawful attempt or offer, with force or violence, to do a corporal hurt to another." Section 305, Id. As an assault, as defined by our Code, does not imply an ability to consummate the attempted act, impotency cannot be a defense to the charge of an assault with intent to commit the crime of rape. "Impotency is undoubtedly a sufficient defense to an indictment for the consummated offense, though not for an assault with intent." 1 Whart. Crim. Law, (8th Ed.) § 552; 1 Bish. Crim.

Law, §§ 737, 738; Barb. Crim. Law, 114; *Com. v. Green*, 2 Pick. 380; *Kunkle v. State*, 32 Ind. 231.

7. The next point urged is in reference to the court's charge: "Should this court make errors, it will not only be ready this to correct, but there stands a higher court above that will protect the rights of the defendant." We do not think there was any error in this portion of the charge. Even if there was, we cannot see that the defendant was prejudiced thereby. *Young v. Harris*, (Dak.) 32 N. W. Rep. 97; *Territory v. Chartrand*, 1 Dak. 379; *U. S. v. Adams*, 2 Dak. 305; *Spencer v. Tozer*, 15 Minn. 146, (Gil. 112;); *Laurel v. State Nat. Bank*, 25 Minn. 48; *Vicksburg & M.R. R. Co. v. Putnam*, 118 U. S. 553, 7 Sup. Ct. Rep. 1.

There being no error in the record, the judgment of the district court is affirmed.

All the justices concurring, except FRANCIS, J., who dissents.

FRANCIS, J., (*dissenting*.) In dissenting from the foregoing opinion, I shall not discuss the main questions brought under review in this case, and concerning which courts have expressed conflicting views, and shall only refer to one of the errors assigned, which seems to me, of itself, to warrant a reversal of the judgment below. The defendant may have been guilty of an assault, but not "with intent to commit a rape," for which he was convicted. His act was a very degraded and beastly one, and, morally considered, he may be justly suffering punishment. But, legally considered, he is not, in my view, lawfully restrained of his liberty for the crime of which he was found guilty, and for the punishment of which his term of imprisonment was measured. In charging the jury, the learned chief justice, holding the district court, said: "Should this court make errors, it will not only be ready this to correct, but there stands a higher court above, that will protect the rights of the defendant." This I regard as error. The error was not in what the court said, considered by itself, as a mere statement, but in saying it at the time and place. When once said,

as part of the charge, it was capable of a construction or application tending to prejudice the defendant, and was the only reference in the charge to the subject-matter it related to, and was therefore unqualified by anything else in the charge. It was a statement by the court, in a criminal case, that there might be errors on its part; and that if the jury acted under the influence of such errors, or any of them, the defendant, if he suffered thereby, would be protected by the higher court. It was as if the court had said: "There may be some doubt about the correctness of the law stated by me as applicable to the act of the defendant for which he is upon trial; but if he ought not to be convicted, and you take that law, and, applying it to the evidence in the case, find him guilty, he will nevertheless be protected in his rights if he goes to the higher court."

It is the right of every defendant on trial for any offense to have his trial confined to the law of and the evidence in the case. So, especially under the circumstances of this case, it was the right of the defendant that the jury (who would have needed very little moving force or influence to impel their own natural inclinations against the crime with which he was charged to the point of finding him guilty) should only be moved or influenced by the law and the evidence properly in the case.

If that portion of the charge before quoted influenced the jury, (and who shall say, with certainty, that it did not,) then is it not probable such influence was not in favor of the defendant, but against him?

That portion of the charge referred to was not a statement of the law, nor was it a statement of any fact or thing sworn to, or offered in evidence, but it was an allegation of an existing or possible fact, or of mixed questions of law and fact, not in the case in its trial in the district court, and with respect to which there was no evidence and no issue raised, and a declaration of something uncertain that might not then exist, and might not occur thereafter, namely, that the court might have committed or might commit errors in the trial, and that, if it had or

should, there was a higher court that would protect the rights of the defendant. And so the jury may have reasoned that, if there was a higher court, that would protect the defendant from the effect of any errors which the trial court might commit, then that same higher court would right any wrong which might be in their verdict, and that it was not, therefore, necessary for them to very carefully consider or weigh the case, since their verdict, if unjust to the defendant, would be set aside by the higher court, to which they may have practically relegated him.

When the case reached this court, the prisoner was entitled to the very protection at the hands of the higher court which the lower court admitted and asserted he was entitled to, and which, in my judgment, has not been extended to him.

This court, in the language of the opinion, speaking of that portion of the charge heretofore alluded to, say: "We do not think there was any error in this portion of the charge. Even if there was, we cannot see that the defendant was prejudiced thereby."

The first conclusion is based upon an assumption of knowledge as to what will not influence the minds, acts, and verdicts of jurors, which cannot be attained in the realm of reason, and in seeking after which we can never advance beyond the environments of mere speculation.

The second conclusion (as to the prejudice to the defendant) is also an assumption that involves the impossible determining or measuring of the nature, extent, and effect of the influence of said portion of the charge upon the minds, deliberations, and opinions of the jurors.

How can it be reasoned out that these remarks in the charge did not influence the jury? And, if they did, how can it be demonstrated or determined in reason that such influence was not against nor prejudicial to the defendant? What the court thinks does not exist, and what the court declares it cannot see, may in reality exist. The extent of our mental discovery is limited by the extent of the effort made to see or discover what is sought after. This declaration of the supreme court is an

admission that the error, and the prejudice therefrom, may exist, but have not come within the range of the vision of the court, and have not, therefore, been discerned. It was or was not an error in the trial court to give to the jury, as a part of its charge, the words complained of. If it was an error, it was either prejudicial to the defendant, or was not prejudicial to him. If it was prejudicial to him, no one would have the legal hardihood to affirmatively declare that the prejudice did not affect him in a substantial right. The remarks of a court, in its charge to the jury, in expressing its own views, or in stating what does or does not, or may or may not, exist or occur, will naturally have more influence or effect upon the jury than the mere rulings of the court in admitting or excluding evidence.

The court must conduct the trial on its part, and on the part of all concerned therein, in the manner designated by law, and within the rules of correct practice. The state may use all the weapons, and no others, authorized by constitutional laws for the prosecution of the prisoner, and he, in turn, is entitled to every shield, weapon, and defense given to *him* by constitutional laws to strike down, ward off, or break the force of the state's weapons. And if he is vanquished by the use of a weapon not legally permitted to be used in the combat, or it appears that any wound, disability, or injury received by or inflicted upon him, which led, or may have led, to his being vanquished or finally worsted, was caused or may have been caused, or assisted in its infliction, by the use of said unauthorized weapon, or by the use of an authorized weapon in an unauthorized manner or for an unauthorized purpose, whether used by the court itself, or permitted by the court to be used in the conflict, he may demand, and should be accorded, a new trial of strength in the legal arena above which the trial court sits as an umpire, whose rulings are subject to review and correction in the appellate tribunal. The defenses, weapons, and shields furnished by the law to persons charged with crime are very numerous, and, in my opinion, by their number and effectiveness, tend to encourage rather than to prevent or diminish crime; but the responsibility of enacting laws

is not upon the courts whose province is to expound, and then apply and enforce, constitutional laws when made, and every defendant may claim and should have every advantage in the law which he may rightfully invoke, one of which is that he shall not be prejudiced or injured in or be deprived of any of his substantial rights by any error at his trial.

An error may consist in subjecting a litigant to the application or effect of an erroneous statement of law, or of a correct legal principle or provision not properly applicable to his case; or in depriving him of the benefit of some legal provision or principle to which his case, as it stands before the court, on the law and the evidence, entitles him; or in admitting or injecting into the case something outside of or foreign to the issues involved in it, which may, after it gets into the case, or upon the record, work to his disadvantage, or impair his substantial right; or in refusing to admit, or in striking out when once admitted, something which should have been let in or allowed to remain, and which, had it been suffered to enter or to remain, would or might reasonably have been of advantage to him.

There are doubtless, some cases in which it may be ascertained and declared, with tolerable clearness, that an error, admitted to exist, did not and could not prejudice any substantial right of the defendant. But this is not such a case.

When it does not clearly appear that the error complained of could not or did not affect the defendant in a substantial right, he is entitled to the effect and benefit of his exception, if properly taken and saved, and of the assignment of error thereon if properly assigned.

In passing upon an error properly excepted to and assigned, in a case involving the life or liberty of the defendant, we should make, not the inquiry, generally impossible of certain answer, did it influence the jury unfavorably to the defendant? but the inquiry, which may more correctly be answered in reason and from an inspection of the case, namely, might the jury have been influenced by it, unfavorably to the defendant, in arriving

at their verdict, which declared him guilty, and certainly affected his substantial right, and does it satisfactorily appear that they were not?

And, on the hearing on writ of error, if it is evident that the jury might or may have been influenced by the error in reaching and rendering their verdict against the defendant, or it does not satisfactorily appear that they were not, the court cannot reasonably nor justly say that, even granting the existence of the error, it was not prejudicial to the defendant because the fact that it was prejudicial does not affirmatively appear. I will cite only two (conveniently at hand) from the many decisions fully sustaining my reasoning and conclusions as to said error. In *Jackson v. Water Co.*, 14 Cal. 25, (a civil case,) the court said: "We cannot see clearly that the defendants were not injured by this error. They might have been; but the rule is that every error is *prima facie* an injury to the party against whom it is made, and it rests with the other party clearly to show, not that probably no hurt was done, but that none could have been or was done by the error."

And in *Busenius v. Coffee*, 14 Cal. 94, (also a civil action,) the supreme court, in passing upon the refusal of the trial court to give an instruction asked by plaintiff's counsel, held: "We cannot undertake to determine to what extent the plaintiffs were prejudiced, or whether prejudiced at all, by the refusal of the court to give this instruction. The record does not, of course, furnish us with a perfect history of the trial, and, even if it did, the grossest injustice might be done if we should decline to interfere with the judgment upon the ground that the action of the jury was not influenced by the error of the court."

In *U. S. v. Adams*, 2 Dak. 305-332, 9 N. W. Rep. 718, the judge at the trial court, in charging the jury, used the following language: "If the court commits an error in giving you the law, there is a higher tribunal to correct it; but if the jury commits an error, if it is a verdict of acquittal, it is remediless. If the jury commit an error, and it is a verdict of guilty, then the defendant has a remedy by appealing to the court."

The case of *U. S. v. Adams* is cited in the foregoing opinion in this case, as authority for the views of the court on the error under consideration. The above language, in the charge in the *Adams Case*, should have been held as error. The supreme court, however, in passing upon it, (MOODY, J.,) held it not as error in that particular case, (for reasons which may have been satisfactory to that court, but cannot be fairly applied to this case,) and at the same time said: "If this language stood alone upon the subject, or if the case was one admitting of any doubt by a jury, although what is there said is strictly true, this court certainly could not have commended the use of it, but rather would be inclined to condemn it as at least useless, if not harmful." This is a careful and rather mild allusion to and criticism of the subject, but has, after all, considerable expression.

Considering the error mentioned, and viewing the entire case in the light of the law appearing to me to be applicable to it, and on the whole record before us, I am of the opinion that the judgment of the district court should be reversed.

**GARDNER, Appellant, v. BOARD OF EDUCATION OF THE CITY OF
FARGO et al., Respondents.**

1. Residence—Sufficiency of Facts to Constitute.

Plaintiff claiming for his children the school privileges due a resident of a certain city, it appeared that prior to the fall of 1885 he resided with his family on a fully-equipped farm, owned by him, about 20 miles from the city; that each fall he took his family to the city, rented a house, sent his children to school during the winter, gave up the house in the spring, and returned with them to the farm; that a hired man remained on the farm, and took care of the stock during their absence; that farm-house furniture and other property was used in the city, and taken back in the spring; that he had no permanent business in the city during the winter; his reason for bringing the children in was that on the farm in the winter they were deprived of social and school advantages; that in the fall of 1886 he was a town officer where the farm was situated, and voted there at that time, but in the spring of 1887 he

voted in the city; that he and his family would probably return to the farm in the spring of 1888, if he continued to own it; but that he is now, January, 1888, in the city, with his family, and claims it as his residence. *Held* not a resident of the city, and not entitled to the privileges claimed.

PALMER and THOMAS, JJ., dissenting.

2. Evidence of Residence—Choice.

In determining the true residence, choice is an element to be considered, but it is inferior in weight to tangible acts indicating residence.

(Argued February 21, 1888; affirmed February 22; opinion filed May 22, 1888.)

Appeal from the district court of Cass county; Hon. W. B. McCONNELL, Judge.

A. D. Thomas, for appellant.

The plaintiff's legal residence is in Fargo.

The term "residence" does not admit of an exact, all-comprehensive definition, for the reason that its signification varies according to the subject-matter with reference to which it is employed. *Frost v. Brisbin*, 19 Wend. 11; *Haggart v. Morgan*, 2 N. Y. 422; *Bell v. Pierce*, 51 N. Y. 12; *Stout v. Leonard*, 37 N. J. L. 492; *Fitzgerald v. Arel*, (Ia.) 16 N. W. Rep. 712; *Borland v. Boston*, 132 Mass. 337.

For some purposes one may have a winter and a summer residence. *Bartlett v. City*, 5 Sandf. S. C. R. 44; *Douglass v. Mayor*, 2 Duer, 110-118; *Stout v. Leonard*, 37 N. J. L. 492.

Generally, to gain a residence for purposes of taxation, or the exercise of political rights, it is said that the mental act of fixing upon a given place as one's permanent home for an indefinite period must concur with the overt physical act of actually residing there. *McCrary, Elections*, §§ 34-41; *Follweiler v. Lutz*, (Pa.) 2 Atl. Rep. 721; *Kemma v. Brockhaus*, 5 Fed. Rep. 762; *Sharon v. Hill*, 26 Fed. Rep. 337-343.

In a case of doubt as to which of two or more places constitutes a person's legal residence, the fact that he has recently voted at one of them is regarded as well-nigh conclusive of his intention to claim a domicile at that place. *McCrary, Elec-*

tions, § 34; *Follweiler v. Lutz*, (Pa.) 2 Atl. Rep. 721; *Winn v. Gilmer*, 27 Fed. Rep. 817-819. *

Upon the question of residence a party may testify directly to his intention, and, if all his acts are consistent therewith, and he is not impeached or contradicted, his testimony upon this subject, as upon others, must be accepted as proof. *Kemma v. Brockhaus*, 5 Fed. Rep. 762; *Sharon v. Hill*, 27 Fed. Rep. 337-343.

M. W. Greene and *L. S. Norton*, for respondents.

The only question to be considered is, is the plaintiff a resident of the city of Fargo? The very definition of the word "resident" is, "one who has a stationary and fixed place of abode," and we submit that the temporary habitation of the plaintiff does not come within that definition. *Vanderpool v. O'Hanlon*, 5 N. W. Rep. 119, 53 Iowa, 257; *Dow v. Gould & Curry Manuf'g Co.*, 31 Cal. 629; *Du Puy v. Wurtz*, 53 N. Y. 556.

We do not consider it necessary to multiply authorities to sustain these decisions; and, applying them to the facts of this case, as found by the court, the judgment should be sustained.

McCONNELL, J. Gardner, plaintiff below and appellant here, seeks by proceeding in *mandamus* to have his children admitted to the privilege of free attendance and tuition in the public schools in the city of Fargo.

The trial court, denying the peremptory writ, gave judgment in favor of the defendants.

It was conceded that appellant's children were of lawful school age, were in appellant's care and control, and were entitled to such privilege of free attendance and tuition, except as affected by appellant's residence. Defendants held that he was not a resident of Fargo, and therefore denied to his children the privilege of free attendance and tuition in the Fargo schools. The board of education exacted as a condition precedent to admission of appellant's children into said schools that tuition fees,

of the amount previously fixed by the board for all non-resident pupils, be paid on their account.

The right of the board to exact and collect such tuition fees on the part of non-resident pupils was not denied.

The sole question, then, before the trial court, was as to appellant being a resident or non-resident of the city of Fargo. The court held that he was a non-resident; and it is conceded that, if such finding be correct, the judgment of the court must be affirmed.

Where a particular domicile is affirmed on one side and denied on the other, there are, broadly stated, two lines or types of cases presented,—one, where the particular domicile is conceded to have existed, and the evidence is only as to its loss or retention; the other, where the evidence goes wholly as to the original acquirement of the domicile. The case at bar is of the latter type. Appellant does not claim for his evidence that it shows a *continuing* Fargo domicile, except as it may show a *beginning* Fargo domicile.

It may be noted in this connection that in all the proceedings of the trial court no point was made on either side as to the technical difference between "residence" and "domicile," and that "residence" is used throughout the record as the synonym of "domicile." While it has been said that "a clear difference exists in law between domicile and residence," (*Taney's Appeal*, 38 Leg. Int. 294,) and it is true that there is a difference, taking the word "residence" in its narrower sense, as in the rule laid down by Story, Conf. Laws, § 41, where it is said: "Two things must concur to constitute domicile: *First*, residence; and, *second*, intention of making it the home of the party,"—yet, as in the case at bar all turns upon the construction of "resident" and "non-resident," as used by the board of education of Fargo, the tacit assumption of counsel and court that these words were used in the technical sense of "domiciled" and "non-domiciled" may be suffered to pass without criticism, especially as a like tacit assumption is made in many cases throughout the reports. It may be regarded, therefore, as settled, so

far as the case at bar is concerned, that "residence" and "domicile" are synonymous.

Appellant claims that the beginning of his alleged domicile in Fargo was in the fall of 1885. It is shown clearly that prior to the fall of 1885 his domicile was near Everest, a small town in Cass county, distant some 20 miles from Fargo. Near Everest he owned and owns a farm of 800 acres, fully equipped with the live-stock and machinery necessary to run it. In the dwelling-house on this farm he lived with his family prior to the fall of 1885, and here was his domicile. On appellant, then, devolved not only the burden of proving his alleged Fargo domicile, but also the burden of proving his loss of the uncontested Everest domicile. He could not gain his alleged Fargo domicile without first losing his uncontested Everest domicile; and, while it is true that satisfactory proof of new domicile gained is sufficient proof of former domicile lost, yet the evidence in these cases is often so distinctly blended with facts having special reference to the new, and facts having special reference to the former, domicile, as to keep both propositions before the mind for separate consideration and separate solution before concluding that the proof of new domicile gained is satisfactory. "A domicile once acquired is presumed to continue until it is shown to have changed." *Mitchell v. U. S.*, 21 Wall. 350; *Somerville v. Somerville*, 5 Vesey, 787; *Harvard College v. Gore*, 5 Pick. 370; Whart. Conf. Laws, § 35.

"Where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation." *Mitchell v. U. S.*, *supra*.

To constitute a new domicile two things are indispensable: *First*, residence in the new location; *second*, the intention to remain there. Mere absence from a fixed home, however long continued, cannot work the change. *Anderson v. Anderson*, 42 Vt. 352.

Appellant's own testimony was the only testimony before the court upon the question of domicile. His testimony was that in the fall of 1885, and each fall since then, he took his family

to Fargo, rented a house there, and sent his children to the Fargo schools until the summer, when the rented house was given up, and all went back to the farm, to remain until fall again; that during the sojourns in Fargo, a man in appellant's employ remained on the farm, and took care of the stock,—twenty-one horses, a cow, two or three calves, and some hogs; that appellant was often at the farm during the Fargo sojourning of his family, but was not there "most of the time;" that the furniture of the Fargo house was furniture brought from the farm, and taken back in the summer, and that the only other property of appellant at the Fargo establishment,—two cows and two horses,—was equally migratory; that neither appellant nor his wife had any "permanent business" in Fargo during the winter months, which seems to mean that all they did in the city was to care for the family, in the narrower sense of the word; that appellant's reason for bringing his children to the city was that their "being out on the farm in the bleak winter, deprived of all society and church and school privileges, was rather a hard matter for them;" that in the fall of 1886 he was a township officer in the township where his farm is situated, and voted there that fall, but that he voted in Fargo in the spring of 1887; that he and his family will probably return to the farm in the spring of 1888, as in preceding summers, if he continues to own it; that he "now," to-wit, at the time of trial, January, 1888, resides with his family at Fargo, and claims Fargo as his residence and home.

If, upon this testimony, the trial court had found appellant to be duly domiciled in Fargo, it would, we think, have given undue weight to appellant's naked declaration claiming Fargo as his domicile. The objective facts—those matters not depending upon ingenious conjecture as to what may be graven on the hidden tablets of the mind—are clearly against the theory of appellant's domicile in Fargo. We do not think that any appellate court would venture to disturb the finding from appellant's testimony that neither in fact nor in intent had he changed his Everest domicile.

"Choice, as between two places of residence, is an element to be considered in determining which is the real domicile; but a choice in favor of one place will not be permitted to control a preponderance of evidence in favor of another. * * * If the evidence be equivocal and uncertain, then the choice may be sufficient to turn the scale; if the weight of it be one way, then an opposite intention or wish will be of little or no avail." *Thayer v. Boston*, 124 Mass. 146.

"It depends not upon proving particular facts, but whether all the facts and circumstances, taken together, tending to show that a man has his home or domicile in one place, overbalance all the like proofs tending to establish it in another." *Abington v. North Bridgewater*, 23 Pick. 170.

In cases much closer than the one at bar it has been held that the expression of choice or election between two potential domiciles is outweighed by objective facts. In *Chenery v. Wal-
tham*, 8 Cush. 327, the dividing line between two towns passed through the plaintiff's house, so that, to a certain extent, he practiced domiciliary acts in both. Could his claim of domicile in one of the two towns bar the right of the other to claim him as a resident and tax-payer, upon the town so claiming showing a preponderance of domiciliary acts, done within its own limits? The judge was asked by plaintiff, who sought to recover back a tax paid to defendant, to rule that, if the true dividing line between the two towns passed through an integral portion of the dwelling-house occupied by him and his family, then he had a right to elect in which town he would be assessed on his personal property, and become a citizen. This was refused, and it was rightly ruled that, if the house was so divided by the line as to leave that portion of it in which the occupant mainly and substantially performed those acts and offices which characterized his home (such as sleeping, eating, sitting, and receiving visitors) in one town, then the occupant would be a citizen of that town, and no right of election would exist; but that, if the house was so divided by the line as to render it impossible to determine in which town the occupant mainly and substantially

performed the acts and offices above referred to, then the occupant would have a right of election, and his election would be binding on both towns.

In these, and, we think, in all well-considered cases, the rule is to let the more tangible domiciliary acts have the greater weight in determining the true domicile. A man may spend but a small portion of his time at his domicile, and yet not in the least impair its *status* as his true domicile. Long sojourns elsewhere, accompanied by ordinary domiciliary acts, do not militate against it.

In the case at bar the *situs* of occupation and of property, coupled with the intention to return, fixed the Everest farm as appellant's real domicile. The intention to claim Fargo as a residence is merely a special, auxiliary intention, and, under all the circumstances, should have little weight in determining the actual domicile, "upon which so many important municipal obligations and privileges depend."

It is laudable on appellant's part to desire city advantages for his family; and the reasonable tuition fees collected in Fargo of non-resident pupils cannot be considered a practical hindrance to appellant's desire.

Had appellant's vote at Fargo in the spring of 1887 been challenged and refused, and the question of his right to so vote been before the lower court as the *gravamen* of this case, it must have decided against him. The fact of his so voting unchallenged is therefore of no importance. The judgment of the court below is affirmed.

All the justices concurring, except PALMER and THOMAS, JJ., who dissent.

THOMAS, J. I dissent from the foregoing opinion on the ground that in my opinion the undisputed evidence in the case shows the appellant to have been a *bona fide* resident of the city of Fargo.

PATTEE, Respondent, v. CHICAGO, M. & ST. P. RY. Co., Appellant.

1. Railroads—Injuries to Passengers—Condition of Track—Evidence.

In an action for damages against a railroad company for personal injuries caused by the derailment of a car from a broken rail, the court admitted evidence of the condition of the land and track, without confining it to the time and exact place of the accident. *Held* error.

2. Same—Instructions.

In an action for damages against a railroad company for personal injuries caused by the derailment of a car, the court instructed the jury "that experience proves that when the track and machinery are in perfect condition, and prudently operated, the trains will keep upon the track, and run thereon with entire safety to those on the cars.

"Whenever a car leaves the track, and goes down an embankment, as this car did, it proves that either the track or machinery, or some portion thereof, is not in proper condition, or that the machinery is not properly operated." *Held* error, as, taken together, it in effect affirms that the happening of such an accident is conclusive, instead of *prima facie*, proof of negligence.

The use of the term "perfect" in such connection is objectionable, as it is liable to cause the jury to think that the law exacts of railway corporations the duty of furnishing something better than a reasonably good track for the transportation of passengers.

(Argued February 8, 1887; reversed February 16; opinion filed May 23, 1888.)

Appeal from the district court of Brule county; Hon. A. J. EDGERTON, Judge.

J. W. Cary and *R. B. Tripp*, (*Burton Hanson*, of counsel,) for appellant.

The testimony which the appellant introduced fully rebutted the *prima facie* case made by the respondent, and conclusively showed, as a matter of law, that there was no negligence on its part in any of the respects charged against it.

The testimony which the respondent offered in the first instance only made out a *prima facie* case against the appellant. The duty, then, was upon the appellant to show that it was not negligent in respect to any of the claims put forth by the

respondent, or that the negligence claimed by her did not in any way contribute to the accident. This duty the appellant claims it fully met, and that the testimony which it offered, and which stands uncontradicted and unimpeached, is conclusive upon the respondent, and the court below should have so held as a matter of law. The *prima facie* case made by the respondent only raised a presumption of law against the appellant. The presumption was disputable. The rule is that no disputable presumption of law is to be regarded as testimony which must necessarily be submitted to a jury, but its office is merely to determine on which party the *onus probandi* is laid. *Spaulding v. Railway Co.*, 33 Wis. 582, (see 592.)

The weight and effect and the amount and character of the proof necessary to overcome the presumption which arose against the appellant out of the *prima facie* case made against it, are questions for the court, and not for the jury to determine. *Spaulding v. Railway Co.*, *supra*.

It was the duty of the court to hold, as a matter of law, that the presumption was overcome. *McPadden v. Railway Co.*, 44 N. Y. 478.

Section 679, C. C. Pro., provides that the killing or damaging of any horses, etc., by the cars or locomotives, etc., shall be *prima facie* evidence of carelessness and negligence of said corporation.

Kentucky has the same statute. In the case of *Talbot v. Railway Co.*, 78 Ky. 621, 7 Amer. & Eng. R. Cas. 585, it was held that the uncontradicted and unimpeached testimony of such employes of the railway company as are presumed to know the facts, that there was no negligence, overcame the *prima facie* case, and that there could be no recovery. See, also, *Packwood v. Railway Co.*, 7 Amer. & Eng. R. Cas. 584.

The court erred in its charge as to the presumptive proof on a car leaving the track.

It, in terms, told the jury that the respondent had made out a case that could not be rebutted by the appellant. There is no dispute but what the car left the track, and that it went down

an embankment. The most that can be claimed from these facts is that it made a *prima facie* case against the appellant, which it was bound to explain. The court did not so instruct the jury, but told them that these facts proved negligence against the appellant. *Garretson v. Pegg*, 64 Ill. 111.

It may be claimed that the latter part of the instruction is good law in stating that "it presumptively proved," etc. Admitting that this is so, it in no way cured the erroneous instruction. *Gale v. Rector*, 5 Bradw. 489; *Henks v. Railway Co.*, 91 Ill. 406; *Ills. Co. v. Hough*, Id. 63; *Railway Co. v. McMath*, 4 Bradw. 356.

There was also error in charging that "experience proves that, when the track and machinery are in perfect condition, and prudently operated, the trains will keep upon the track, and run thereon with entire safety to those on the cars."

Experience proves quite the contrary. Besides, the court ought not to have told the jury what experience proved. It was for the jury, after applying their own experience to the testimony, to say what it proved, and not for the court to tell them as a matter of law what it proved.

The undisputed testimony in the case, given by persons who had had large experience in railway service, showed conclusively that in very cold weather it was not an uncommon thing for rails to break by the passage of trains over them, and for cars to leave the track, although the greatest care was exercised in the construction and maintenance of the road-bed and track, as well as in the running of the train.

The court erred in admitting the evidence as to the condition of the track east and west of the broken rail. *Morse v. Railroad Co.*, 30 Minn. 465, 16 N. W. Rep. 358.

J. M. Long, for respondent.

The testimony with reference to the condition of the track was competent. *Missouri Pac. Ry. v. Collier*, 18 Amer. & Eng. Ry. Cas. 282; 94 Pa. St. 351; 5 Amer. & Eng. Ry. Cas. 407.

The charge in reference to a *prima facie* case adopts the rule

of the court of appeals of New York. *Caldwell v. Steam-Boat Co.*, 47 N. Y. 291; *Edgerston v. Railroad Co.*, 39 N. Y. 227; *Curtiss v. Railway Co.*, 18 N. Y. 534; *Seybalt v. Railway*, 95 N. Y. 568. See, also, *Railway Co. v. Raybolt*, 99 Ind. 551; *Railway Co. v. Burk*, 96 Ind. 346; *Railway Co. v. Wilkins*, 74 Ind. 462; *Railway Co. v. Newell*, 72 Ind. 542, 23 Amer. & Eng. Ry. Cas. 492; *Railway Co. v. Miles*, 13 Amer. & Eng. Ry. Cas. 10; 6 South. L. R. 537; 31 Amer. Dec. 325, 326, notes; *Railway Co. v. Reynolds*, 88 Ill. 418; *Railway Co. v. Thompson*, 56 Ill. 138.

. McCONNELL, J. This is one of those actions which the growing magnitude of railway building and railway travel has rendered very common in all courts of general jurisdiction throughout the United States. The plaintiff, while a passenger upon one of appellant's trains, received personal injuries, through the derailment of the coach in which she was riding,—an accident resulting from a broken rail. This action is for damages for such injuries; and the substantial issue between the parties upon the trial, briefly stated in general language, was this: Did the plaintiff's injuries result from appellant's negligence? The jury found for the plaintiff a verdict for \$3,000. Judgment for this amount was entered after motion for new trial overruled.

Upon the trial, after the testimony had been all given, appellant's counsel requested the trial court to direct the jury to find a verdict for the defendant. This request was denied, and appellant excepted. The question involved in this ruling is now pressed by appellant before us, and we shall examine its pertinency preliminary to passing upon such other questions as appellant presents and we deem material for our consideration.

The theory of law upon which appellant's counsel based such request we state in our own language, as follows: Proof of personal injury to a passenger, as such, establishes, as a *presumption of law*, that such injury resulted from the carrier's negligence. The effect of this presumption is to cast upon the carrier defendant the burden of proving that the injury complained

of did not result through his negligence. If thereupon he introduces competent evidence tending to show that his track, vehicle, and motive power were, at the time of the accident, up to the high standard of condition required for the transportation of human beings; were in charge of competent servants, then and there using due care in and about the management of the same; and if such evidence in that behalf remain uncontradicted and unconflicting,—its weight and effect are for the court, and not for the jury, to determine. And if, furthermore, such evidence be to the court clear and satisfactory against the presumption of law that there was negligence, there is no case to go to the jury, and the court should hold accordingly.

This theory of the law is sustained by many respectable authorities. "The rule of law is doubtless that, where there is no conflict of testimony, where the existence of a fact is clearly proved by undisputed testimony, the court should hold that the fact is established, and it is error to leave it to the jury to find whether or not the fact exists." *Spaulding v. Railway Co.*, 33 Wis. 582, citing numerous authorities.

In the case above cited, it was argued that the presumption of negligence arising on simple proof of the injury should be held to have the legal effect of conflicting testimony, so as to entitle the case to go to the jury; but it was held otherwise, and that such presumption, being a presumption of law and not of fact, simply cast upon the defendant the burden of proof under the issue as to negligence.

While the theory of law, as above stated, may be unobjectionable, and seems to be in conformity with section 679 of the Code of Civil Procedure of this territory, defining, in certain cases, what shall constitute *prima facie* evidence of negligence on the part of railway corporations, the learned trial judge could not have held it applicable to the case at bar consistently with his other rulings. In his opinion, as shown by his ruling, there was competent evidence on the part of the plaintiff tending to rebut the testimony of appellant's witnesses that the condition of the track was good at the place of the accident. Unless, then, we

should first decide that all such rebutting evidence was incompetent and improperly admitted, we need not pass upon the correctness of said theory, nor upon its applicability to the case at bar. It will be sufficient for us to pass upon the more immediate assignments of error. These may be broadly stated as twofold,—error in admitting evidence, and error in the charge to the jury.

The alleged errors as to admitting evidence relate to testimony offered as to condition of track at or near the place of accident, and may be considered as one. The testimony admitted, under objection, is that, where the car was derailed, and east and west of that spot along the track, the land was low and wet, with sloughs on both sides of track there; that some of the rails “along there” were loose on the ties, so that the hand could be run under them, (without the question as to such looseness being confined to a particular time;) that the ties made an uneven surface, so that cars running over it caused the rails to go down, (without question being confined to any particular time or place;) that the track was not very smooth “along where this derailment was,” (question as to place was in the words quoted, and not limited to any particular time;) the ties were loose in some places, and the rails were all old.

The condition of the track and road-bed at the time and place of the derailment was certainly material; but we think that the testimony objected to, as we have above grouped it, shows plainly that the learned trial court admitted what tended as much to show former and general negligence about track and road-bed as it did to show that particular negligence for which alone appellant would be liable in this action.

That the land along this portion of the track was low and wet is not material, in any sense, so far as the other evidence shows; and the effect, if any, upon the jury of testimony in that behalf could only have been to confuse. We may suppose that plaintiff's witnesses were asked, in reference to the land being low and wet, as a reason for and to corroborate their statement of the badness of the track, although such reason does not appear

except inferentially. But, as a matter of fact, land merely low and wet, provided it have, as is frequently the case, a stiff sub-soil, offers no obstacle whatever to the making of a smooth and permanent road-bed. It is evident that appellant intended the road-bed here made to be permanent, as it appears from the evidence that an embankment had been thrown up, and the track ballasted with gravel. It was therefore error to admit testimony as to such lowness and wetness, treating it as in itself a primary material fact; perhaps not such vital error as would, if standing alone, cause an appellate tribunal to reverse, yet one which, linked with the vagueness as to time and place with which condition of track was described in accompanying testimony, as above cited, may well have tended to influence the jury to appellant's prejudice.

We have already indicated that there was error in not confining testimony as to condition of track more closely to the time and place of the accident. The exact place of the broken rail and of the derailment seems to have been known to the witnesses. The language of the supreme court of Minnesota, in a recent case, seems pertinent in this connection: "The evidence, under the circumstances, should have been limited to those defects which caused, or reasonably might have conduced to producing, the defect existing at the place of casualty. * * * The only exceptions to this rule which now occur to us are where the other defects were shown to be the result of a cause presumptively operating at the place of casualty, or where such defects might have caused a defect which produced the injury. But there are no facts shown bringing this case within any such exception." *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. Rep. 358.

The evidence of plaintiff's witnesses as to the condition of track seems to refer to the same in both directions from the accident. No reason is attempted to be shown that would render material the condition of the track beyond the place of accident, in the direction the train was moving. It is barely possible that such reason might exist, and be found valid, if supported by appropriate evidence. An officer at West Point is said to have

struck the trunnion of a cannon repeatedly with equal blows of a hammer. At the hundredth blow, or thereabouts, the trunnion was broken; and it has been philosophically remarked that not the hundredth blow, but all the blows, did the breaking. In like manner it might be argued (and possibly proved) that, within certain limits, the fact of rough track, in both directions from a broken rail, by causing undue swaying of the train, caused undue strain of the rail with every passing car, thereby shortening the life of the rail, and affixing to it a fatal but undiscoverable likelihood to break every next time. However, we shall not speculate upon the hypothetical effect of what we certainly do not judicially know, nor, as at present advised, otherwise know.

That portion of the charge to the jury which we think it necessary to examine in relation to the assignments of error is as follows:

"Experience proves that when the track and machinery are in perfect condition, and prudently operated, the trains will keep upon the track, and run thereon with entire safety to those on the cars,—the passengers on board.

"Whenever a car leaves the track, and goes down an embankment, as this car did, it proves that either the track or machinery, or some portion thereof, is not in proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in proper condition and to operate it with necessary prudence and care, have in some manner violated their duty to the plaintiff."

There is error in the first of the two paragraphs quoted, in that it assumes as judicial knowledge what is at best only a disputable conclusion of fact; disputable, certainly, unless we apply as the test of "perfect condition" and "prudent operation" the misleading but otherwise "barren ideality" of pronouncing no track "perfect" and no machinery "prudently operated" except after a passage safely made. Indeed, the very use of the word "perfect" in this connection, and unexplained, is objectionable, as likely to cause the jury to think that the law exacts of

railway corporations the duty of furnishing something better than a reasonably good track for the transportation of passengers,—a track, say, ideally good. That superlatives in this behalf are at least unnecessary, see *Cunningham v. Hall*, 4 Allen, 268, where the court say: "Reasonable care or skill is a relative phrase, and what this requires is always to be determined by consideration of the subject-matter to which it is applied;" holding that "reasonable care or skill" would require of a ship-builder to use the same degree of care or skill as if he were in terms required to use the utmost possible skill.

The first paragraph quoted of the charge, and that portion of the second paragraph preceding the words, "and presumptively proves," affirm, taken together as they occur in the charge, propositions to the unmistakable effect that the happening of such accident is conclusive, instead of *prima facie*, proof of negligence. Should the remainder of the second paragraph, as quoted, be held to state a correct proposition of law, such would not cure this fatal error. We are not aware of any authority holding that a jury may be expected to discover a lurking contradiction, and decide correctly, between different statements of the law.

The judgment of the court below is reversed, and a new trial ordered.

All the justices concurring.

**TERRITORY OF DAKOTA *ex rel.* TRAVELERS' INS. CO., Plaintiff, v.
THE JUDGE OF THE DISTRICT COURT OF THE THIRD
JUDICIAL DISTRICT, etc., Defendant.**

Mandamus—Venue in Foreclosure Proceedings.

Section 92, C. C. Pro., requiring an action to foreclose a mortgage on real property to be brought in the county where the land is situated, is so qualified by section 95, providing that if the county named in the complaint be not the proper one, it may be tried therein, unless the defendant, before the time for answering expires, demands in writing that the trial be had in the proper county, that a district court, on default,

has jurisdiction to render a decree foreclosing a mortgage on land situated in another county and district from that in which the action was brought, and *mandamus* will issue requiring such court to take cognizance of the case, on its refusal to do so.

(Submitted May 10, 1887; decided May 26; opinion filed May 24. 1888.)

Original application for a writ of *mandamus*.

Francis & Southard, for plaintiff.

No brief on file.

No counsel for defendant.

McCONNELL, J. This is an application to this court for a writ of *mandamus*, made upon the usual notice, wherein it is sought to compel the defendant to take cognizance of a certain action brought in the district court in and for Cass county. The demand for relief by the plaintiff is for the foreclosure of real property situate in La Moure county, in the Sixth judicial district. The plaintiff applied to the judge of the court below, upon proper proofs of default by the defendant in the action, and of its right to recover, but judgment was denied, *pro forma*, upon the ground that the foreclosure proceedings were in the Sixth judicial district, and that the judge of the Third judicial district had no jurisdiction.

This motion brings up for our consideration the construction of section 92, Code Civil Procedure, which provides that an action for the foreclosure of a mortgage on real property must be brought in the county in which the land is situated. Section 95, however, provides: "If the county designated for that purpose in the complaint be not the proper county, the action may notwithstanding be tried therein, unless the defendant, before the time for answering expire, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of the parties, or by order of the court, as provided in this section." We think that the latter section is a qualification of the former, and that the court had jurisdiction; that the statute is merely directory with respect to the place of

trial; and that the defendant simply has a personal right to insist upon those actions which are denominated as "local" being tried in the county in which the subject-matter is situated, and which right the defendant to the action may waive, and in this case has waived, by his default. The statutes of New York, California, Minnesota, and Wisconsin are very similar, if not precisely similar, to ours. *Marsh v. Lowry*, 16 How. Pr. 42; *Lane v. Burdick*, 17 Wis. 97; *Hill v. Bradley*, 21 Minn. 15; *O'Neil v. O'Neil*, 54 Cal. 187. The motion is therefore allowed, and the writ will issue.

All the justices concurring.

RICHARDSON *et al.*, Appellants, v. INDEPENDENT SCHOOL-DISTRICT
No. 1, Respondent.

Executions—Property Subject to Levy.

The levy of an execution on a school-warrant of a judgment debtor prior to its receipt and acceptance by him creates no liability in favor of the plaintiff in the execution as against the school-district.

(Argued February 18, 1888; affirmed February 24; opinion filed May 24, 1888.)

Appeal from the district court of Grand Forks county; Hon. W. B. McCONNELL, Judge.

Noyes & McLaughlin, for appellants.

We concede the point, for sake of argument, that a school-district is a *quasi* corporation, and as such is not subject to garnishment. We cannot, however, see wherein the levy of the execution upon the warrant was in the nature of a garnishment. The warrant levied upon was personal property that belonged absolutely to the execution debtor, just as much as though it had been a horse, or any other article of personal property.

The officer made no attempt to levy upon the money in the hands of the respondent, but levied upon the warrant itself as an article of personal property, which it undoubtedly was.

The account of the execution debtor had been audited by the respondent, the warrant had been executed by the proper officers, and there was nothing more to be done by them.

Had the officer gone to the treasurer, and attempted to levy upon the money in his hands awaiting the presentation of the warrant, then the position taken by counsel, that the proceedings were in the nature of garnishment, would be tenable, but here we levy upon the evidence of the debt, not upon any funds provided for its payment.

It is universally held that if A. execute a negotiable note to B., that C., a creditor of B., cannot garnish A. for money owing to B. by A. on the note; yet that C. could levy upon the note itself, the evidence of debt, is just as universally held.

Section 314, C. C. Pro., provides what property is subject to execution. This section would seem to exempt no property except what might be claimed by the debtor under the execution laws. And this section, in connection with section 320, would fully warrant the respondent in delivering the warrant to the officer, as was done in this case, and that the officer's receipt therefor would have been a sufficient discharge and protection to the respondent as against any claim by the debtor. That section provides "that any person indebted," etc., and in this section the word "person" includes not only human beings, but bodies politic or corporate as well. See C. C. § 2112.

W. L. Wilder, for respondent.

A school-district is a municipal corporation, and cannot be garnished, even by its own consent, unless the debtor also consents. Exemptions to garnishment belong to the person whose debt is garnished, rather than the debtor. It is against public policy to allow the wages of persons in public employment to be reached by garnishment. 39 Mich. 484, 5 N. W. Rep. 912.

When a statute provides that corporations may be attached, the meaning of the word "corporation" must be restricted to mean, private or ordinary business corporations, and not to ex-

tend to and embrace municipal corporations or bodies politic. *Wallace v. Lawyer*, 23 Am. Rep. 665, which is a decision construing a statute worded precisely like that of this territory.

The complaint shows that the money attempted to be garnished was at the time in the custody of the law, and therefore not liable to attachment or garnishment. *Waples*, 218.

This rule applies to city and county treasurers. *Burnham v. Fond du Lac*, 15 Wis. 193; *Buckley v. Eckert*, 3 Pa. St. 368; *Rivins v. Harper*, 59 Ill. 21; *Casey v. Davis*, 100 Mass. 124; *Dunlap v. Peterson Fire Ins. Co.*, 74 N. Y. 145.

Appellants claim that the levy was made on the voucher and not the money.

The complaint is here, however, for construction, and we submit it for the court's consideration; maintaining, however, that in either case the alleged levy was abortive and void.

If it is held that the levy was made upon the money, it is in the nature of a garnishment, and is governed by all the rules laid down by the courts as hereinbefore cited, denying the right and forbidding the remedy.

If it be held that the levy was made upon the alleged *voucher*, we submit that, under the facts set forth in the complaint, the so-called "voucher" is neither an article of property nor a chose in action, and that it cannot, in any phase of the positions taken by appellants, be considered as negotiable paper, nor can any of the laws governing the latter be applied to it.

The one essential requisite to the legal existence of said paper as a voucher creating any liability against defendants, viz., delivery and possession to and in the payee named therein, is wanting. *Merrill v. Campbell*, 5 N. W. Rep. 912.

THOMAS, J. This is an appeal from a judgment for costs rendered in favor of respondent in this case in the court below.

The complaint, among other things, alleges that the plaintiff obtained judgment before a justice of the peace against one Alice Gorman for the sum of \$100 and costs; that a transcript, duly certified, of said judgment, was filed and made a matter of rec-

ord in the office of the clerk of the district court of Grand Forks county; that execution was issued out of and under the seal of the district court to satisfy said judgment out of the personal property, etc., of said Alice Gorman; that said execution was indorsed by said plaintiffs, and delivered to the sheriff of said county; that by virtue of said execution said sheriff levied upon certain moneys belonging to the said Alice Gorman then in possession of the defendant herein; defendant then and there acknowledged that it had moneys in its hands and under its control belonging to said Gorman, and through its duly-authorized officer delivered to the sheriff a voucher or warrant No. 842 for the sum of \$60, by which sum the judgment against said Gorman was credited; that the defendant has failed and neglected to pay the said warrant or voucher, or any part thereof, though often requested to do so.

To this complaint defendant interposed a general demurrer, which was sustained by the court, and, plaintiff failing to amend, judgment was rendered in favor of defendant for costs.

The action of the court in sustaining the demurrer is substantially the only assignment of error relied upon in this case.

It appears from the complaint that the procedure had against the defendant was in the nature of garnishment, and, as under the law of this territory the defendant is a *quasi* public corporation, it is urged by defendant that it could not be made subject to proceedings in the nature of attachment or garnishment. This position is conceded by counsel for plaintiff, but it is insisted on behalf of plaintiff that it was not a garnishment, but that the sheriff levied the execution upon the warrant or voucher, which at the time was the property of Alice Gorman. If this insistment be true, and had been sufficiently alleged in the complaint, it might be material and of some avail; but conceding that it was a levy upon the voucher, and that the fact is sufficiently pleaded, it still seems to us that this would not entitle them to recover against the defendant, for the reason that it appears upon the face of the complaint that Alice Gorman, the judgment debtor, had never received or accepted the voucher,

nor had it ever been issued or delivered to her. It was simply written out by the clerk of the school board in her name, and was subject to be revoked before delivery by the action of said school board.

We are therefore clearly of the opinion that the voucher in question had never become her property, and hence a levy upon it could fix no liability on the defendant. Whatever property existed in said voucher was in and under the control of the school board.

This view is fully maintained on principle, and also by a well-considered case, the facts of which are almost identical with the case at bar, handed down by the supreme court of Wisconsin, reported in 5 N. W. Rep. 912, in the case of *Merrill v. Campbell*.

We have not discussed, nor is it necessary to pass upon, the question of the exemption of the defendant corporation from garnishment proceedings, for the reason that it is conceded by counsel for appellant that this proceeding was not of that character; but he contends that it was a levy upon choses in action, instead of a proceeding in the nature of garnishment. This doctrine has, however, been upheld by many of the courts of the states of the Union on the ground of public policy, among which we cite the following cases and authorities: 1 Dill. Mun. Corp. § 101, and notes; Drake, Attachm. c. 22, § 494; Freem. Ex'ns, 133; *Clark v. School Com'rs*, 36 Ala. 621; *Ross v. Allen*, 10 N. H. 96; *Stephens v. Harper*, 59 Ill. 21; *Millison v. Fisk*, 43 Ill. 112; *Morgan v. Smith*, 4 Minn. 104, (Gil. 64;) *School-Dist. v. Gage*, 39 Mich. 484; *McLellan v. Young*, 21 Amer. Rep. 276, 54 Ga. 399; *Buckley v. Eckert*, 3 Pa. St. 386; *Casey v. Davis*, 100 Mass. 124; *Dunlap v. Peterson Fire Ins. Co.*, 74 N. Y. 145.

The judgment is in all things affirmed.

All the justices concurring.

MADISON NATIONAL BANK OF MADISON, DAKOTA, Appellant, v.
FARMER, Respondent.

1. Chattel Mortgages—Mortgagees—Right to Possession.

In an action by a mortgagee to obtain possession of the chattels, as against another mortgagee thereof, he must show default in his mortgage, or such a state of facts as, under it, will entitle him to the possession.

2. Same—Verdict—Value.

In an action of claim and delivery by a third person against a mortgagee, where the latter has a verdict, it is the proper practice for the jury to find the value of the mortgaged chattels, rather than the value of the mortgagee's interest.

(Argued May 15, 1888; affirmed May 25; opinion filed October 1, 1888.)

Appeal from the district court of Davison county; Hon. BARTLETT TRIPP, Judge.

F. L. Soper, for appellant.

Appellant, to secure a reversal, need only show a *prima facie* case before the district court. Thompson, Juries, 36; Woods v. Atlantic Mutual Ins. Co., 50 Mo. 112.

Appellant's mortgages on the property were prior to the respondent's. His, as to the wagon, was given before the mortgagor owned it; it was therefore void. Jones, Chat. Mor. § 138; Gardner v. McEwin, 19 N. Y. 123.

If the defendant is entitled to recover, it would be only his interest in the property, the amount due on his note and mortgage, which is much less than \$300. Wells, Replevin, §§ 584, 585; Allen v. Judson, 71 N. Y. 77; Townsend v. Bargy, 57 N. Y. 665; Weaver v. Darby, 42 Barb. 411; Warner v. Hunt, 30 Wis. 200; Childs v. Childs, 13 Wis. 19.

Winsor & Mentzer and Goodykoontz, Kellam & Porter, for respondent.

We may concede that appellant's mortgages were senior to respondent's, still the mortgagor had a right to make another,

and under it respondent might take possession of the mortgaged property, as provided in his mortgage. And during all this time, and while respondent was so in possession, appellant might have been entitled to take possession under one or both of his mortgages; but the exercise of such right was optional on his part, and respondent could not be in fault for not voluntarily delivering up to him what he never intimated that he wanted. Until demanded by one having a better right, there was nothing to put respondent in the wrong. *Cadwell v. Pray*, (Mich.) 2 N. W. Rep. 52.

The court was entirely uninformed as to what were the conditions of appellant's mortgages. Neither the complaint nor the evidence disclosed more than that they were chattel mortgages. They were not set out in the pleadings, nor were they put in evidence. The appellant, then, had no right to take possession until after default in payment, "unless authorized by the express terms of the mortgage." Section 1733, C. C.; *Smith v. Coolbaugh*, 19 Wis. 106.

In a case like this the jury is required to find the value of the property. Section 263, C. C. Pro.

It is settled that as between these parties this property was rightfully in possession of respondent, and he is liable to whomsoever shows himself entitled to it, to either return the property, or account for its value. This he cannot do if appellant is allowed to keep the property, and pay less than its value for it.

CARLAND, J. Appellant brought an action in the district court of the county of Davison against respondent, to recover the possession of one brown mare, one two-seated light spring wagon with cover, and alleged the value of all of said property to be \$300. In pursuance of the requisition of appellant, the officer delivered the said property to said appellant. The complaint in the action contained the usual averments in such actions, and alleged that the appellant was entitled to the possession of the property described, by virtue of certain chattel mortgages given by J. H. Stuckey and A. J. Stuckey to the Madison

Bank of Madison, Dak.; which said mortgages were described in the complaint in said action by merely giving date of execution and property mortgaged, together with the names of the mortgagors and mortgagees. The complaint further alleged that the appellant was the owner of said mortgages, and the indebtedness secured thereby for a valuable consideration; but nowhere alleged what the conditions of said mortgages were, or that the indebtedness had not been paid, or that any of the conditions of said mortgage had been broken, or that any circumstances whatever had occurred which would entitle the appellant to the possession of the property described. The respondent answered, and denied that appellant was the owner of said property, and also denied any wrongful taking or withholding of the same; but admitted that J. H. Stuckey and A. J. Stuckey had given the mortgages described in the complaint, and that appellant was the owner and holder of the same. For a further defense respondent alleged that on July 2, 1886, one A. J. Stuckey, being the owner of the property described in the complaint, gave the respondent a chattel mortgage on said property, and that the same had been duly recorded; that on the 5th day of January, 1887, default having been made in the payment of the money secured by said mortgage, respondent took possession of the property therein described, and was proceeding to foreclose the same, when the property was taken from him by proceedings in said action. When the case was called for trial, the appellant gave testimony tending to show that the property taken from respondent was the same property described in the mortgages mentioned in the appellant's complaint, and then rested his case. Counsel for respondent moved the court to direct a verdict for respondent, which motion was granted. A verdict was then returned by the jury in the usual form, which assessed the value of the property at \$300. An exception having been taken to the ruling of the court, appellant appealed to this court, and assigned said ruling as error, and also alleges that the verdict is erroneous in not finding the value of defendant's interest in the property, instead of the full sum of \$300,

which appellant alleges would be more than respondent would be entitled to under his mortgage if a redelivery of the property could not be had.

There was no error in the ruling of the court in directing a verdict for respondent, for the very plain reason that the complaint did not allege any fact showing default in any of the conditions of the mortgage, nor that they had any condition under which it could claim possession of the property. The appellant did not make its case at the trial any broader than it had pleaded it. No evidence was introduced or offered to be introduced by appellant showing any mortgage, with conditions or breach of any such conditions. The mere fact that appellant owned these mortgages gave it no right to the possession of the property, without the happening of some event provided for in the mortgage by virtue of which it could take possession, and, if such event had occurred, it was necessary to allege and prove it.

Neither was there any error in the verdict of the jury in finding the value of the property to be \$300. That was the sworn value put upon it by appellant; and while it would have been correct if the mortgagor had brought this action against respondent to have limited the jury to finding the interest in the property which the respondent had, yet where a third party seeks to take property from the mortgagee which he holds by virtue of a mortgage, and that third party shows no right to the possession thereof, it is the proper practice to let the jury find the full value of the property, for the very plain reason that the mortgagee is responsible to his mortgagor for the full value of the property, and is obliged to return the mortgagor any surplus which shall remain after satisfying his own claim, which he could not do without paying it out of his own funds, if he could not recover from the third party the full value of the property taken from him. No error appearing in the record, the judgment of the lower court is affirmed. All concur.

**FIRST NATIONAL BANK OF LOS ANGELES, Appellant, v. DICKSON
et al., Respondents.**

1. Trover and Conversion—Certificates of Deposit—Measure of Damages—Weight of Evidence.

In an action for the conversion of certificates of deposit of a national bank, on the issue of their value, the fact that prior to the conversion they had been protested for non-payment, without explanation of the cause, was evidence tending to show the insolvency of the bank, such as would preclude the court from directing the verdict.

2. Same—Evidence—Opinion—Relevancy.

In an action for the conversion of certificates of deposit, on the issue of value, it is proper to inquire of a person acquainted with the financial condition of the bank issuing them, whether or not, at the time of the conversion, the bank was solvent.

3. Same—Review—Reversible Error.

In an action for the conversion of certificates of deposit, where, on the question of value, the court had improperly excluded the evidence as to the insolvency of the maker, at the time of the conversion, the appellant was not obliged to go further and show the insolvency of his indorser, to make it reversible error.

(Argued May 17, 1888; reversed May 25; opinion filed October 1, 1888.)

Appeal from the district court of Minnehaha county; Hon.
JAMES SPENCER, Judge.

Bailey & Davis, for appellants.

The face value of commercial paper, it may be conceded, is *prima facie* the measure of damages for its conversion.

It is competent, however, to show the insolvency of the maker or any other circumstance to lessen the damages. 3 Suth. Dam. 522; *Potter v. Merchants' Bank*, 28 N. Y. 641; *Booth v. Powers*, 56 N. Y. 22; *Latham v. Brown*, 16 Ia. 118; *Holt v. Van Eps*, 1 Dak. 206.

In another view, there was evidence that tended to diminish the value of the certificates.

They were protested before they were attached. *Booth v. Powers*, *supra*.

The testimony of E. A. Sherman, (shown to be qualified,) that he had examined the assets of the bank, should have been admitted upon the question of the value of the assets, and whether the bank was solvent.

Winsor & Kittredge, for respondent.

The respondent took the certificates with the indorsement of Young, and, in case the maker was insolvent, it had the right to look to Young to make up the deficiency. In order, therefore, to reduce the damage sustained by the *prima facie* case, appellants must produce evidence showing the insolvency of Young, the indorser to the respondent, as well as the insolvency of the maker, the First National Bank of Sioux Falls. *Menkens v. Menkens*, 23 Mo. 252.

We insist that appellants failed to show the insolvency of the maker of these certificates. To be sure, they introduced protests, but that does not prove insolvency; and, even had it a tendency to do so, it does not establish to what extent the bank was insolvent. Further, an inspection of the testimony fails to establish any proof as to the value of these certificates on the 6th day of March, 1886, the day of their conversion by appellants.

CARLAND, J. The respondent commenced an action in the district court of Minnehaha county against appellants for the conversion of three certificates of deposit issued by the First National Bank of Sioux Falls to J. B. Young, on December 24, 1885, for the aggregate sum of \$4,600. The appellants justified the taking by said Joseph M. Dickson under a warrant of attachment issued in an action wherein George H. Hollister was plaintiff and J. B. Young was defendant. At the trial the respondent called the appellant Dickson, who produced the certificates of deposit, which were introduced in evidence, together with the indorsement of J. B. Young thereon, transferring the same to respondent. It was admitted that said certificates were levied upon by the appellant Dickson as sheriff on the 6th day

of March, 1886, in an action then pending wherein George H. Hollister was plaintiff and J. B. Young defendant. The respondent then rested. The appellants introduced in evidence certificates of protest showing that the certificates of deposit had been protested for non-payment prior to the date of the alleged conversion; and, after several ineffectual attempts to show that said certificates of deposit were worth less than their face value, called E. A. Sherman as a witness, who testified that he was president of the Minnehaha National Bank of Sioux Falls, and had been ever since its organization; that between February 1 and March 6, 1887, and after the bank was attached, he looked over the assets of the First National Bank of Sioux Falls; that he went through them with Mr. Garretson, the cashier of the Sioux National Bank of Sioux City, Iowa, with a view of ascertaining if it would be safe to assume the liabilities of said bank, and take their assets, in order to prevent a failure. The witness was then asked this question: "State what you found the character of the assets to be, whether they were good or bad, and whether you found the bank solvent or insolvent." The question was objected to as incompetent and immaterial. The objection was sustained, and exception taken. The witness further testified that he could judge of such assets as he saw; was acquainted with most of the men, and knew their financial standing. The witness was then asked, "What was the value of those assets?" to which an objection was made and sustained, and an exception taken. The respondent then moved the court to direct a verdict in its favor for the face value of the certificates and interest, which motion was granted by the court; to which ruling of the court appellants duly excepted. From the judgment rendered on said verdict appellants appeal, and assign the rulings of the court herein specified as error.

In actions for the conversion of instruments for the payment of money of the character mentioned in this action, the amount appearing to be due thereon, of principal and interest, at the time of the conversion, and the interest upon that aggregate from thence to the trial, is *prima facie* the measure of damages.

Civil Code, §§ 1970-1982; *Booth v. Powers*, 56 N. Y. 22; *Potter v. Bank*, 28 N. Y. 654; 2 Phil. Ev. (Cow. & H. Ed.) 228; 2 Pars. Cont. 471; *Decker v. Mathews*, 12 N. Y. 324; Sedg. Dam. 518; *Paine v. Pritchard*, 2 Car. & P. 558; *Mercer v. Jones*, 3 Camp. 477; *Evans v. Kymer*, 1 Barn. & Adol. 528; *St. John v. O'Connel*, 7 Port. (Ala.) 466. It will then be seen that when the respondent had introduced the certificates of deposit in evidence, with the indorsement of the payee thereon, transferring same to the respondent, accompanied with proof of the conversion of the same by appellants, a *prima facie* case had been made. The appellants, however, had the right to introduce any legal evidence which would tend to show that the certificates of deposit were not worth their face value at the time of the alleged conversion. Among the facts which were competent to show the value of said certificates of deposit was the fact that the maker thereof was at the time of the alleged conversion insolvent. *Potter v. Bank*, 28 N. Y. 655; *McPeters v. Phillips*, 46 Ala. 496; *Latham v. Brown*, 16 Iowa, 118; *Zeigler v. Wells*, 23 Cal. 179; *Cothran v. Bank*, 40 N. Y. Super. Ct. 401. See, also, cases herein cited as to measure of damages. That it was competent to show by proper testimony that the maker of the certificates of deposit was insolvent, does not seem to have been disputed at the trial. The contention of counsel for respondent was that appellants had not introduced, or offered to introduce, any *competent* evidence of the insolvency of the maker of the certificates, viz., the First National Bank of Sioux Falls. The appellants had introduced evidence which showed beyond dispute that at the time of the alleged conversion of the certificates of deposit they had been presented to the maker thereof for payment, and payment had been refused. Was this evidence,—with the cause of the refusal to pay unexplained,—evidence in any degree tending to show the insolvency of the bank? A debtor is insolvent when he is unable to pay his debts from his own means, as they become due. Civil Code, § 2028. In *Brown v. Montgomery*, 20 N. Y. 287, the trial court had charged the jury that the non-payment and protest of a bank-check was ev-

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idence tending to show insolvency. DENIO, J., in delivering the opinion of the court affirming the correctness of such a charge, said: "For when a business man in a commercial town fails to meet his paper, payable at a bank, and especially his checks upon the bank at which he keeps his accounts, the natural inference which every one draws is that he is no longer able to pay his debts." In *Booth v. Powers*, 56 N. Y. 22, which was an action for the conversion of a promissory note for the sum of \$1,500, the defendants in the court below offered to show that the note had been presented for payment, and payment refused, which offer was excluded. FOLEX, J., in delivering the opinion of the court of appeals, uses the following language: "The defendant also offered to prove that their testator took the necessary and proper steps to present the note for payment, but that it was not paid, and that the makers resided at the place in which the bank was situated, at which the note was made payable. This proof was excluded. We think that this was error. Proof of the inability of the maker to pay his note affects its value. Evidence tending to show disability is given, when it is testified that there is neglect or refusal to pay it according to its terms." "Doubtless the fact of non-payment is not of the same weight in every case. We have seen that in the case last cited the non-payment of a check upon the bank at which the drawer kept his account was reckoned of especial significance. Non-payment of a note discounted for the accommodation of the maker, a man in business in a commercial community, by a bank so related to him, would not be much less. Non-payment of a note made by such a person, at unusual time and on unusual terms, for a consideration not strictly in the line of his ordinary business, payable at a bank designated merely for the convenience of the parties, would be less; and of a note made by one of an occupation, the habits and usages of which did not train him or those about him to a jealous care for credit, would not be of much, if of any, weight. The value of the evidence depends upon the facts of each case. But so long as every man in com-

mercial pursuits, in a community likewise engaged, knows the value of a good credit, does not suffer it to be lightly lost, and is painfully aware that a lapse in a punctual performance of his business obligations does tend to the loss of it, the inference will be natural, from his failure to pay according to his engagement, that he is unable to pay. Such testimony may be met, of course, by evidence of reasons existing which justified a refusal to pay, or excused neglect so to do, or by evidence of real pecuniary ability." When we consider that in this action the maker of the certificates of deposit was a national bank, bound by law and its own business interests to preserve its financial credit and standing above all suspicion, we have no difficulty in coming to the conclusion that every person hearing that its obligations had been protested for non-payment would naturally infer that the bank was unable to pay its debts. We are therefore of the opinion that the evidence showing that the certificates of deposit had been protested was evidence tending to show the insolvency of the bank.

We will next consider whether or not the refusal of the trial court to allow the questions propounded to the witness E. A. Sherman was error; and the solution of this question depends upon the fact whether the two questions asked the witness, as hereinbefore specified, called for testimony that would tend to show the insolvency of the bank. In the case of *Thompson v. Hall*, 45 Barb. 216, there was a question in the court below as to whether one James Thompson, the maker of a note, was insolvent at a certain time. Wright, a witness, stated that he was acquainted with James Thompson's pecuniary circumstances, and had been for several years. The witness then stated numerous facts touching the property of James Thompson, and his indebtedness, showing a full and intimate acquaintance with the insolvent condition of James Thompson. The witness was then asked the direct question: "Was he able to pay his debts in December, 1855, in the usual course of trade?" The answer was: "No, sir; so far as I know, I know he was not." The question was objected to, and objection overruled,

and an exception taken. MARVIN, J., in delivering the opinion of the supreme court, said: "In my opinion, no error was committed in receiving this evidence. I do not understand the question called for the opinion of the witness simply. In form it called for a fact,—was James able to pay his debts in the usual course of trade? If the witness knew the fact, there certainly could be no objection to his stating it." In *Hard v. Brown*, 18 Vt. 87, the solvency of one Rood was in issue. BENNETT, J., in delivering the opinion of the court, said: "We do not see that the county court erred in permitting witnesses, who had a personal acquaintance with Rood, to express their opinion in regard to his solvency, as derived from a personal acquaintance with him, and from information derived from others in the vicinity where he resided, and who were also acquainted with him. When the question in issue is in regard to the pecuniary standing of an individual, the matter must necessarily to some extent rest in opinion. This opinion must be based upon what the witness knows of the individual himself, and upon the estimate of others who know him. The credit of an individual is ordinarily, in fact, in a great degree, made up of opinion." In the case of *Sherman v. Blodgett*, 28 Vt. 149, the plaintiff had sued the defendant as sheriff for having taken insufficient bail on mesne process. The defendant at the trial, to show that the bail was sufficient at the time it was taken, called a witness, who testified that the bail, at the time of the service of the writ which the bail indorsed, owned certain real estate and personal property, which he described, and his means of knowing the then situation and circumstances of the bail. The counsel for the defendant then asked the witness what, in his opinion, from his knowledge of the said Ahira, (the bail,) and his affairs, was the value of said Ahira's property, over and above what he owed, at the time the defendant served the writ. This question was objected to, objection overruled, and exception taken. The supreme court said, in reviewing the case: "We have no doubt the evidence objected to was properly admitted. The solvency of an individual is a matter resting somewhat in opinion; and,

in the present case, the witness had stated what property the bail owned at the time he entered bail, and his means of knowing the situation and circumstances of the bail. Certainly there could then be no objection to his giving his opinion from his knowledge of the bail, and of his affairs, what he thought he was worth." In *Potter v. Bank*, 28 N. Y. 655, the court of appeals, after stating that the insolvency of the maker of a promissory note may always be shown to lessen the damages in an action of trover for the conversion of promissory notes, says: "It was insisted on the trial that the proper question to put to the witness, in order to arrive at the measure of damages, was, what was the value of the note? and the ground on which the right to put the question rests is that such is the inquiry in all other cases where the value of the property is sought to be recovered. The general rule is that the value of property must be ascertained by answers to the direct questions as to its value; and the reason is that persons are examined who know its value, and can speak from their own personal knowledge in relation thereto. But this rule cannot apply to a chose in action. They have no intrinsic value, as a horse or an acre of land has. Their value depends on the pecuniary condition of the parties liable thereon; and hence, in such cases, the direct and proper inquiry would be, are the parties to a bill or note, or other choses in action, solvent, and able to pay their debts?" Now, what is the case at bar? The witness Sherman had shown by his testimony that he was fully qualified, by reason of his personal knowledge of the affairs of the First National Bank of Sioux Falls, to testify as to whether on the 6th day of March, 1886, said bank was able to pay its debts or not, or, which is the same thing, whether it was solvent or not. He was asked whether the bank was solvent or insolvent in two different ways, and each question was excluded. We think the trial court erred in excluding these questions. The witness had shown such an acquaintance with the financial condition of the bank that he could testify, as a matter of fact, whether the bank could pay its debts or not. But we are told by respondent that there was no error com-

mitted in directing a verdict for the respondent, for the reason that appellants did not show, or offer to show, that the indorser of the certificates, J. B. Young, was insolvent; and, in support of this position, we are referred to the case of *Menkens v. Menkens*, 23 Mo. 252. It is undoubtedly true that, in order to show that the certificates of deposit were worth less than their face value, the appellants would be obliged to show that all parties liable thereon to the respondent were not able to pay their debts at the time of the conversion; but, if appellants could not, by all the resources at their command, show the insolvency of the bank, they might well hesitate to go further, in view of the fact that, whatever they should show, as to the insolvency of the other parties liable on the certificates, it would avail them nothing, for the reason that the financial credit of the maker of the certificates would still stand unimpaired.

Judgment reversed. All the justices concurring, except SPENCER, J., not voting.

McMILLAN *et al.*, Appellants, v. PHILLIPS, Respondent.

1. Mechanics' Liens—Subcontractors—Notice.

Under section 556, C. C. Pro., as amended by chapter 94, Laws 1881, providing that every subcontractor desiring to avail himself of a mechanic's lien shall give notice to the owner, etc., "before or at the time" he furnishes any material, of his intention to furnish the same, the notice is a prerequisite to the establishment of a valid lien.

2. Same—Personal Judgment—Privity of Contract.

In such case, where it appeared the subcontractor commenced to furnish the materials for which he claimed a lien about a month before giving notice to the owner, *held*, the lien was invalid, and, there being no privity of contract, he was not entitled to a personal judgment against the owner.

(Argued May 18, 1888; affirmed May 25; opinion filed October 1, 1888.)

Appeal from the district court, Minnehaha county; Hon. C. S. PALMER, Judge.

C. H. Winsor, for appellant.

This action brings up two questions:

First. Whether a person who has furnished material and lumber for a building, under an agreement with the contractor originally, after having notified the owner, can file a mechanic's lien, after 60 days have passed by, and enforce it against the building, and owner, to the extent of what he still owes the contractor.

This is to be determined by the legislative intent to be gathered from sections 656, 658-660, C. C. Pro.; chapter 94, Laws 1881; and chapter 84, Laws 1883.

The first law limited the right of the subcontractor to receive his pay from the owner by giving notice to him at the time he furnished the material, and filing a notice of lien within 30 days. Section 656. And in section 658 it provided that he could recover if, at any time within six months after he had furnished his material, he should file a notice of lien, and give notice to the owner and to the contractor, if the owner owed the contractor at the time of such service the amount that the subcontractor claimed. But afterwards, in 1881 and 1883, it seems that the legislature intended to give all laboring men and all material-men the right to recover at any time, if the owner did not fully pay the contractor, when notice was given, and the lien was filed.

Second. The court erred in directing a verdict for the defendant, whether the evidence failed to show the existence of a lien or not. This court has decided that if the evidence should fail to show the existence of a mechanic's lien, still the plaintiff could proceed and recover a personal judgment against the defendant. *McCormack v. Phillips*, 34 N. W. Rep. 53. See, also, *Patrick v. Abeles*, 27 Mo. 184; *Maltby v. Greene*, 3 N. Y. 144.

A. C. Phillips and *A. R. Bryan*, for respondent.

The plaintiffs were subcontractors. The case is one where the material and lumber were furnished under a contract with

the contractor. C. C. Pro. § 671; Phillips, Mech. Liens, § 44.

By plaintiffs' own testimony the material was furnished between July and September, 1882; and their rights must be determined by the mechanic's lien law of this territory at that time. Chapter 94, Laws 1881.

The notice of intention was imperative. Phillips, Mech. Liens, §§ 21, 32, 327, 338.

There is no pretense that the required notice was given.

Our Code limits the time within which the subcontractor may file a lien to six months; and, so far as the owner is concerned, it is strictly a proceeding *in rem*. Phillips, Mech. Liens, § 447; *Spencer v. Burnett*, 35 N. Y. 97; *Guass v. Hussman*, (Mo.) 5 West. Rep. p. 89; *Towner v. Remick*, (Mo.) 1 West. Rep. 721.

Plaintiffs contend that, if the evidence fails to show a lien, they could still proceed to recover a personal judgment against the defendant. This is incorrect. There is no privity of contract between the subcontractor and the owner, and it is for that reason that every provision made necessary to fasten a lien upon a stranger to the contract must be strictly complied with. Phillips, Mech. Liens, §§ 349, 447; Kneeland, Mech. Liens, 340.

The complaint alleges no indebtedness of defendant to plaintiffs; nor a contract, express or implied. See *Farnham v. Davis*, 4 N. E. Rep. 404; Phila. 397; *Scudder v. Balkam*, 40 Me. 293; *Oliver v. Woodman*, 66 Me. 59.

CARLAND, J. Appellants brought their action in the district court of Minnehaha county, to foreclose a mechanic's lien on lots 15, 16, 17, and 18, and the N. $\frac{1}{2}$ of lot 14, in block 15, of Bennett's First addition to Sioux Falls. At the trial the appellants here, plaintiffs below, offered testimony tending to show that between July 1 and October 1, 1882, plaintiffs sold and delivered to one McCormack certain building materials, amounting to the sum of \$146.05; that said materials were used in the construction of a building then being erected for the respondent by said McCormack, under and by virtue of a contract entered into between said McCormack and said Phillips; that, prior to

the delivery of said material to McCormack, plaintiffs notified Phillips that they were about to furnish lumber to McCormack to be used in the construction of his (Phillips') house, and that they would look to Phillips for their pay. Plaintiffs' counsel then offered in evidence a notice of lien, filed in the office of the clerk of the district court of Minnehaha county, January 27, 1885. Defendant's counsel objected. The court sustained the objection, to which ruling an exception was taken. The ruling of the court in this regard is assigned as error.

We think the ruling was correct. The law in force at the time the materials were furnished is the law that regulated the manner in which a lien might be created for claims of subcontractors. At the time the materials were furnished in this case, the law provided that "every subcontractor wishing to avail himself of the benefits of this chapter shall give notice to the owner, his agent or trustee, *before or at the time* he furnishes any of the things aforesaid, or performs any labor, of his intention to perform or furnish the same." Section 656, Code Civil Proc., as amended by chapter 94, Laws 1881. H. W. Ross, a witness sworn for the plaintiffs, was the only witness who testified concerning the giving of the notice. He testified that he notified Phillips that the plaintiffs were about to furnish building material to McCormack, to be used in the construction of Phillips' house, the latter part of August or the 1st of September, 1882. He also testified that plaintiffs commenced selling the materials to McCormack for which a lien was claimed, July 24, 1882; that \$16.02 of the bill was furnished in September, 1882. The notice to be given by the material-man to the owner, as provided by the law above quoted, of his intention to furnish the materials or perform labor, is a prerequisite to the establishment of a valid lien. It must be done, or the right to file a lien under that section cannot exist. There was no evidence before the court that the notice required by statute had been given, and hence no foundation had been laid for the introduction of the notice of lien itself. The plaintiffs might have availed themselves of the provisions of section 658, Code Civil

Proc., if they had filed their notice of lien within six months after the materials were furnished, and otherwise complied with the provisions of said section; but, not having done so, the notice of lien filed January 27, 1885, was not admissible in evidence for any purpose.

Upon the refusal of the court to admit the notice of lien in evidence, the defendant moved the court to direct a verdict for the defendant; which motion was granted by the court, against the objection of plaintiffs. Plaintiffs duly excepted to the ruling of the court, and now assign its action in this regard as error, for the reason that, admitting the plaintiffs had failed to establish their lien, they still had the right to a personal judgment. We think there was no error in the ruling of the court. There was no privity of contract existing between the plaintiffs and Phillips that would warrant the rendition of a personal judgment against the latter.

Judgment affirmed. All concur.

HOLLENBECK, Appellant, v. PRIOR *et al.*, Respondents.

1. Specific Performance—Contract—Certainty.

P., in consideration of a conveyance of land at a certain figure, on which to plat a town, agreed to plat the same and reconvey to the owner a block of average size to include the land on which his dwelling stood. After the town had been platted this block was fractional. *Held*, the agreement was too indefinite and uncertain to be specifically enforced.

2. Same—Part Performance.

In an action for specific performance of a contract, a party cannot predicate part performance upon being in possession of the land, when the possession was not induced by the contract.

(Argued May 9, 1888; affirmed May 25; opinion filed October 1, 1888.)

Appeal from the district court of Sanborn county; Hon. BARTLETT TRIPP, Judge.

N. B. Reed, for appellant.

It is obvious from the contract that all parties intended the reserved block to conform in size to the others, and that the streets bounding the other blocks should form the boundaries to this block.

The general rule of specific performance is that a conveyance will not be enforced if the boundary of the tract is not agreed upon. There are at least two exceptions to this rule: *First*, where the contract itself prescribes the manner of fixing the boundaries; *second*, where the parties have entered into a partial performance of the contract.

It must be borne in mind that this case does not present a mere executory contract; it sets out a case where the grantor remains in possession, asserting his rights, and at the same time shows that the contract has been in part performed according to the agreement by delivery of deed and subsequent survey into blocks and lots, streets and alleys. We maintain that, having so far located this block by running streets on three sides of it,—on the south, west, and north,—that in equity Fourth avenue, extended, became the eastern boundary. With appellant in possession, any one with the deed reserving the block, and the memorandum referred to it in the deed, could take the plat and locate the exact block these parties intended to be excepted from the grant. The contract between these parties is capable of construction. It is not void from uncertainty. *Pom. Spec. Perf.* § 159; *Waterman, Spec. Perf.* § 142; *Purinton v. North. Ill. R. R. Co.*, 46 Ill. 297; *Sanderson v. C. & W. R. R. Co.*, 11 Beav. 497; *Parker v. Taswell*, 4 Jur. U. S. 183; *Brashier v. Gratz*, 6 Wheat. 528.

W. H. Norris and Dillon & Preston, for respondents.

The decision below was right.

1. If the plaintiff has a valid, intelligible, certain contract, he has an ample remedy in damages for the difference between block 29 as it is and as he claims it ought to be. *Parkhurst v. Van Cortlandt*, 1 John. Ch. 278.

2. The case here attempted is too broad. No cause of action is shown for demandable relief, and for no more.

3. No effectual or final relief is here awardable for want of the presence before the court of the public or public authorities, as to surrounding streets.

The authorities cited by appellant do not sustain his position. An examination shows them favorable for respondents.

Our chief contention is that the alleged contract, memorandum, or reservation, whether considered as a contract or as a notice to the railway company, is void for uncertainty, and incapable of specific enforcement.

The only data for the required block are that it should contain Hollenbeck's dwelling-house, (particular location not disclosed,) and contain not more than 300 feet square.

This is a proceeding *in rem*. Where is the *rem*?

"Clearness and certainty in a contract are obviously so important and fundamental, it seems scarcely necessary to say very much on the subject, or to refer to many authorities." *Waterman*, 152, 154; *Colson v. Thompson*, 2 Wheat. 336; *Morrison v. Rassignol*, 5 Cal. 65; *Minturn v. Baylis*, 33 Cal. 129; *Agard v. Valencia*, 39 Cal. 292; *Munsell v. Loree*, 21 Mich. 497; *Schmeling v. Krissel*, 45 Wis. 325; *Waterman v. Dutton*, 6 Wis. 265; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Ring v. Ashworth*, 3 Ia. 452; *Camden & A. R. R. Co. v. Stewart*, 18 N. J. Eq. 491; *Whelan v. Sullivan*, 102 Mass. 204; *Jordan v. Fay*, 40 Me. 132; *Blanchard v. Detroit, L. & L. M. R. R. Co.*, 31 Mich. 52, 53, 58; *Preston v. Preston*, 95 U. S. 200-202; *Pierson v. Ballard*, 32 Minn. 263, 20 N. W. Rep. 193; *Westfall v. Cottrills*, 24 W. Va. 763; *Ryan v. Davis*, 5 Mont. 505; *Tuney v. Batchell*, 34 Md. 154; *Appeal of Holthouse*, 12 Atl. Rep. 340.

The part performance recognized in the case of *Purinton v. North. Ill. R. R. Co.*, 46 Ill. 297, is improvement, expenditure, by a purchaser let into possession, induced or knowingly permitted by vendor, and for that reason estopping the vendor.

Here Hollenbeck, always in possession by virtue of his original ownership, since conveying has expended or done nothing.

CARLAND, J. This is an appeal from a judgment of the district court for Sanborn county, sustaining a demurrer to the complaint of the plaintiff. Two demurrers were interposed; one by the defendant the Chicago, Milwaukee & St. Paul Railway Company, and one by defendant Charles H. Prior. The ground of demurrer, as specified by said defendants, was that the complaint did not state sufficient facts to constitute a cause of action. The defendant John Paul filed a disclaimer. On the hearing of the demurrers the same were sustained, and, the plaintiff electing to stand on his complaint, judgment was entered in favor of defendants, from which judgment plaintiff appealed.

The plaintiff, in his complaint, alleges, in substance, that on September 18, 1883, plaintiff was the owner of the N. E. $\frac{1}{4}$ of section 28, township 107 N., of range 62, upon which he then and ever since has resided. That by warranty deed dated September 18, 1883, he conveyed a portion of said land to the defendant Charles H. Prior. That by a memorandum in writing it was mutually agreed between said plaintiff and said Charles H. Prior that, in consideration of the conveyance of said land to said Prior for the sum of \$2,500, said Prior would lay out a town, and plat said land into lots and blocks, streets and alleys; and that plaintiff might reserve to himself one block of land of the average-sized blocks of said town, not to exceed 300 feet square; and that the block that should be reserved should be the one on which the plaintiff's dwelling-house then stood. That the deed of conveyance from plaintiff to said Prior contained this reservation: "Reserving to himself his dwelling-house, and one block of land where the same is situated, to be reconveyed to said Hollenbeck by said Prior, as per memorandum this day made." That after the making of said deed, and prior to October 18, 1883, said Prior duly platted said land into blocks of the average size of 300 feet square, which plat was duly recorded October 17, 1883, in the office of the register of deeds of Sanborn county. That when said plat was completed, the portion of land on which plaintiff's dwelling-house stood was shown as a fractional block, and numbered block 29. That.

said block was not 300 feet square. That said fractional block measured 262.7 feet on Sixth street, 300 feet on Dumont avenue, 129.4 feet on Seventh street, and on the east was bounded by a straight line drawn from a point on the north side of Sixth street, 262.7 feet east of Dumont avenue, to a point on the south side of Seventh street, 129.6 feet east of said Dumont avenue. That the Chicago, Milwaukee & St. Paul Railway Company is a subsequent purchaser, with notice, of a portion of the premises. That said Prior never reconveyed to plaintiff any portion of the said quarter section. That the streets and alleys made by the platting of the premises in question were legally dedicated to the public use of the town of Woonsocket. The principal prayer of the complaint is that the defendant Charles H. Prior be required to duly execute and deliver to plaintiff a good and sufficient deed for a block of land 300 feet square, which shall include plaintiff's residence; or, in case of the refusal of said Prior so to do, that the court appoint some person to make such conveyance.

All facts sufficiently pleaded are admitted by the demurrers of defendants; consequently the only question for this court to determine is, (taking the statements of the complaint to be true,) can a court of equity grant the relief prayed for? It will be observed that the plaintiff does not ask that defendant Prior be compelled to convey to him block 29 as platted, but a block of land 300 feet square, which shall include within its boundaries the plaintiff's dwelling-house. In order to do this, the court would be obliged to replat the town of Woonsocket. The district court of Sanborn county was asked to grant the relief prayed for, because in the deed of conveyance from the plaintiff to Prior there was a reservation of a block of land where plaintiff's dwelling-house stood, and by the written memorandum executed about the same time said block was to be an average-sized block *not exceeding* 300 feet square. We think the district court did right in sustaining the demurrers of defendants, for the reason that the contract set forth in the complaint is too indefinite and uncertain to be specifically enforced by a court of

equity. It is an elementary principle of equitable jurisdiction in cases similar to the one under consideration that, "if the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy." *Colson v. Thompson*, 2 Wheat. 336; *Morrison v. Rossignol*, 5 Cal. 65; *Minturn v. Baylis*, 33 Cal. 129; *Agard v. Valencia*, 39 Cal. 292; *Munsell v. Loree*, 21 Mich. 497; *Schmeling v. Kriesel*, 45 Wis. 325; Wat. Spec. Perf. § 154; *Preston v. Preston*, 95 U. S. 200-202; *Blanchard v. Railroad Co.*, 31 Mich. 52, 53; *Whelan v. Sullivan*, 102 Mass. 204; *Jordan v. Fay*, 40 Me. 132; *Pierson v. Ballard*, 32 Minn. 263, 20 N. W. Rep. 193.

How could the district court tell from the complaint what the location and boundaries of the proposed block were? And, if so, how could it change the plat of the town of Woonsocket in this action?

Appellant seeks to avoid the objections here suggested by alleging that the contract had been partially performed by the plaintiff; that he was in possession of the land to be reconveyed, and still remains in possession; but it cannot be claimed that the plaintiff went into possession of the land in pursuance of the contract, for he was residing on the land when the contract was made. If there has been any part performance of the contract, it has been performed by Prior, and his part performance could not aid the plaintiff in this action. Part performance, which courts recognize as sufficient to entitle a person to specific performance of contracts relating to land, is improvement and expenditure made by a purchaser let into possession, induced or knowingly permitted by the vendor. The appellant, in support of his contention, relies principally upon *Purinton v. Railroad Co.*, 46 Ill. 297. An examination of that case, however, shows that it supports the position of the respondent. Purinton had agreed to convey to the railway company a right of way across his land 80 feet wide. No definite place was mentioned in the contract as to where the right of way should

be located. The company built its line across Purinton's land, and demanded a deed for the strip taken, which was refused. The company then brought suit to compel a specific performance of the contract. The defense was made that the contract was too uncertain and indefinite. In discussing this question the court says: "It is insisted that this contract is too indefinite and uncertain in its description of the land to be enforced. There might be force in this objection if it were not that the company had gone into possession and constructed their road with the permission of appellants. By letting the company into possession, the parties locate the eighty-foot strip through this piece of ground. They give a construction to the agreement by the manner in which they have in part executed it. If a vendor gives a bond for the conveyance of ten acres, part of one hundred and sixty acres, or other large tract, without any other designation of the particular portion, such a contract would no doubt be inoperative for want of certainty, NOR COULD THE PURCHASER OR A STRANGER TO THE CONTRACT DO ANY ACT BY WHICH THAT UNCERTAINTY COULD BE AIDED OR REMOVED. But if the vendor and vendee were to select the number of acres, and separate them from the remainder, and the purchaser were permitted to enter into the same, make improvements thereon, and to hold possession, the contract would thereby be so far executed as to remove the uncertainty, and a court of equity would compel the execution of a deed. By permitting the purchaser to hold possession, and to make lasting and valuable improvements, the vendor is estopped from urging the uncertainty of his obligation. And this fully accords with the case of *Shirley v. Spencer*, 4 Gilman, 583. In that case the parties had located one tract of the land, but had failed to locate the other; and the court decreed a specific performance of the contract so far as the parties had located the one by possession and improvement, etc., but dismissed the bill as to the other, where they had failed in any manner to determine its location.

"It is true, appellants deny that Purinton ever put the company into possession, but they admit that he permitted them

to proceed to locate and construct their road at that place. We are at a loss to perceive a distinction between the two acts. What he permitted the company to do, without objection, amounted to putting them into possession as fully as if he had personally gone on the land, and formally said to them that he invested them with possession. He admits that he permitted them to go on it and construct their road."

It will be seen that it is impossible for any person to ascertain from the contract set forth in the complaint how much land was to be conveyed by Prior to Hollenbeck, or where it should be located. Judgment affirmed. All concur.

BOSTWICK *et al.*, Respondents, v. KNIGHT *et al.*, Appellants.

1. Appeal—Chambers Order—Method of Review.

An appeal will not lie from the order of a district judge restraining the foreclosure of a chattel mortgage by advertisement. If it were reviewable as affecting a substantial right, it would first be necessary to move the court for its vacation, and appeal from the order of the court refusing so to do, under subdivision 5, § 23, c. 20, Laws 1887, providing for appeals from orders of the district court vacating or refusing to set aside orders made at chambers in case such order would have been appealable if made by the court.

2. Same—Procedure—Bill of Exceptions Necessary.

A party desiring to review an order in such a case must have, settled and allowed by the judge, a bill of exceptions relating thereto, or there will be no record on which the supreme court can act, and the appeal will be dismissed.

(Argued May 8, 1888; decided May 9; opinion filed October 1, 1888.)

An appeal from an order of Hon. JAMES SPENCER, Judge, Fifth district.

Subdivision 5, § 23, Laws 1887, provides that an appeal may be taken "from orders made by the district court, vacating or refusing to set aside orders made at chambers, where, by
V.5DAK.—20

the provisions of this act, an appeal might have been taken in case the order so made at chambers had been granted or denied by the district court in the first instance."

M. O. Little, G. W. Hawes, and R. H. Brown, for appellants.

L. W. Crowfoot, C. S. Palmer, and J. H. Owen, for respondents.

CARLAND, J. On the 3d day of December, A. D. 1887, the Honorable JAMES SPENCER, presiding judge of the Fifth judicial district of this territory, pursuant to an order to show cause previously granted in the above-entitled proceeding, made an order at chambers, enjoining the said George W. Hawes and Robert F. Gibson, Jr., their agents, attorneys, and assigns, from foreclosing, by advertisement, a certain chattel mortgage, given by said respondents to said Hawes and Gibson; and further ordering that all further proceedings for the foreclosure of said mortgage be had in the district court in and for the county of Roberts. This order was made in pursuance of chapter 62, Laws 1883. From said order the appellants appealed to this court.

The respondents moved that said appeal be dismissed, for the reason that said order is not an appealable order, and for the further reason that, if the order is appealable, no bill of exceptions was ever settled in said proceeding.

It is our opinion that said appeal must be dismissed for both of the reasons mentioned; and, as the points raised involve questions of practice, we will express an opinion on both points, rather than dispose of the case on a single point. Without deciding whether this order would have been appealable had it been made by the court as an order affecting a substantial right, or finally determining the proceedings, we are clearly of the opinion that said order cannot be reviewed on this appeal. The order appealed from was clearly a chambers order, which, if appealable, had it been made by the court, could not be reviewed on appeal under the provisions of sub-

division 5, § 23, c. 20, Laws 1887, without first moving the court to vacate the order, and then appealing from the order of the court refusing so to do.

Attached to the order appealed from, and sent to this court with this appeal, are numerous papers certified by the clerk of the district court of Roberts county to be the original papers upon which the order was granted. No exception appears to have been taken to the granting of the order appealed from, and no bill of exceptions appears among the papers transmitted to this court. It will therefore be plainly seen that there is no record presented upon which this court can act. Appellants contend that by virtue of section 2, c. 21, Laws 1887, providing that certain decisions and orders therein mentioned shall be deemed to have been excepted to, relieve the appellants from the necessity of having a bill of exceptions allowed and settled by the judge making the order. This is taking an erroneous view of the section above quoted. That section was no doubt enacted for the benefit of parties who, through inadvertence or other cause, should fail to take an exception to the orders or decisions therein mentioned, when they were present, and also for those parties who should be absent when the order or decision was made or rendered. It is still just as essential to have the exception settled by the judge making the order or rendering the decision, by incorporating into the record all papers and evidence upon which the decision or order is based, as it was before the enactment of said section. In cases where an order or decision is deemed to have been excepted to for the reason that it was made or rendered *ex parte*, or in the absence of the party, the certificate of the judge in settling the bill must show the existence of such a state of facts as would bring the party appealing within the provisions of the section referred to. *Lamet v. Miller*, 11 Pac. Rep. 745; *Purdum v. Taylor*, 9 Pac. Rep. 607; *Guthrie v. Phelan*, 6 Pac. Rep. 107.

If the profession would keep in mind the fundamental idea that, in the absence of statute, the judge who presides over the proceeding, which results in the making of an order or rendi-

tion of a decision, is the only authority that can authenticate a record for the use of this court, it would save great delay to clients, and annoyance to the appellate tribunal. Appeal dismissed. All concur.

Boss, Appellant, v. NORTHERN PACIFIC RAILROAD COMPANY, Respondent.

Master and Servant—Negligence of Master—Jury—Questions for.

In an action against a railroad company, by a section-man, for injuries received in being struck by a switch-signal, it appeared that at the time of the accident he was on a train with his fellow-laborers and others, going to dinner, according to the usual method adopted by his foreman; that from the number on the platform he was obliged to stand on the bottom step, and, as the car passed the switch, which was leaning towards the track, he was struck on the back of the head; that he did not know of the switch; that it was constructed within four feet of the track; that such a switch was generally placed six feet from a track by all railroads; that this came in contact with passing cars when leaning towards the track. The court directed a verdict for the defendant company. *Held* error.

(Argued May 10, 1888; reversed May 25; opinion filed October 2, 1888.)

Appeal from the district court of Cass county; Hon. W. B. McCONNELL, Judge.

Taylor Crum, for appellant.

Cited *Railroad Co. v. Jones*, 95 U. S. 441, 442; *Metropolis Bank v. Guttschlick*, 14 Pet. 19; *N. J. R. R. Co. v. Pollard*, 22 Wall. 341; *Detroit & M. R. R. Co. v. Van Steinburg*, 17 Mich. 99; *Sioux City & P. R. R. Co. v. Stout*, 17 Wall. 657; *Pa. R. R. Co. v. Peters*, 9 Atl. Rep. 318; *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 234; *Nolan v. Brooklyn City & N. R. R. Co.*, 87 N. Y. 67; *Morrison v. Erie R. R. Co.*, 56 N. Y. 307, 55 Amer. Dec. 672, note; *Gray v. Scott*, 66 Pa. St. 345; *Fowler v. Baltimore, etc., R. R. Co.*, 18 W. Va. 579; *G. P. R. v. Walling*, 37 Amer. Rep. 711, note; *R. R. Co. v. Bondron*, 92 Pa. St. 475;

Camden & A. R. R. Co. v. Hoosey, 44 Amer. Rep. 120; *Shear. & R. Neg.* 10, 25, 26, 28, 31; *McGrew v. Stone*, 52 Pa. St. 436; *Hunt v. City of Salem*, 121 Mass. 294; *Woods v. Boston*, 121 Mass. 337; *M. & St. P. R. R. Co. v. Kellogg*, 94 U. S. 474; *Atkinson v. Goodrich T. Co.*, 18 N. W. Rep. 774; *Werle v. L. I. R. R. Co.*, 98 N. Y. 650; *Pierce*, 328; *Fernandes v. S. R. R. Co.*, 52 Cal. 45; *Twomley v. Cen. P. & N. E. R. R. Co.*, 69 N. Y. 128; 2 Rorer, 1211; *N. P. R. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *Lane v. Atlantic Works*, 111 Mass. 139; *Beach*, 23; *Clark v. Eighth Av. R. R. Co.*, 36 N. Y. 135; *Willis v. L. R. R. Co.*, 34 N. Y. 669; *Colgrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 492; *Jamison v. S. J. & S. C. R. R. Co.*, 55 Cal. 596; *C. B. & Q. R. R. Co. v. Gregory*, 58 Ill. 272; *Fitts v. Cream City R. R. Co.*, 18 N. W. Rep. 186; *Ill. C. R. R. Co. v. Welch*, 52 Ill. 183; *Muldong v. R. R. Co.*, 36 Iowa, 462; *Spencer v. M. & P. R. R. Co.*, 17 Wis. 503; *Griggs v. Huston*, 104 U. S. 553; *C. & E. R. R. Co. v. Hedges*, 7 N. E. Rep. 805; *Bennett v. R. R. Co.*, 102 U. S. 580; *Pierce*, 371-376; *Lanning v. N. Y. C. R. R. Co.*, 49 N. Y. 538; *Randen v. C., R. I. & P. R. R. Co.*, 36 Iowa, 372; *Derby v. Ky. C. R. R. Co.*, 4 S. W. Rep. 304; *Beach*, 67, 69; *Harriman v. P. & St. L. R. R. Co.*, 12 N. E. Rep. 456; *G. T. R. R. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. Rep. 493; *Whit. Smith, Neg.* 309; *Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274; *Dickinson v. P. H. & N. W. R. R. Co.*, 18 N. W. Rep. 353; *Barry v. Ferkildsen*, 13 Pac. Rep. 657; *Hacket v. Middlesex M. Co.*, 101 Mass. 101; *John v. Hud. R. R. Co.*, 20 N. Y. 65; *Beach*, 95; *Ernst v. H. R. R. Co.*, 35 N. Y. 39; *Bigelow, Lead. Cas. Torts*, 707; C. C. § 1131.

Ball, Wallin & Smith, for respondent.

Railroad companies have the right to put up structures on their right of way whenever and wherever they see fit, subject only to liability for such injuries as are caused by such structures to employes while engaged in their proper sphere of duty, and to passengers while riding in their proper places on the cars. *Gibson v. Erie R. R. Co.*, 63 N. Y. 449-453; *Randall v. Balt.*

& *Ohio R. R. Co.*, 109 U. S. 485, 3 Sup. Ct. Rep. 322; *Pittsburg, etc., R. R. Co. v. Sentmeyer*, 37 Amer. Rep. 684-686.

Plaintiff assumed the risk. C. C. § 1130; *Randall v. Balt. & Ohio R. R. Co.*, 109 U. S. 478, 482, 483, 3 Sup. Ct. Rep. 322; *Lovejoy v. Boston & L. R. R. Co.*, 125 Mass. 79; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412; *Bresnahan v. Mich. Cent. R. Co.*, 49 Mich. 410, 13 N. W. Rep. 797; *Baylor v. Delaware, L. & W. R.*, 29 Amer. Rep. 208.

It appears that the plaintiff had passed this switch-stand daily for weeks next preceding the injury. *B. & O. R. Co. v. Stricker*, 51 Md. 47, 34 Amer. Rep. 291; *Devit v. Pacific R. R. Co.*, 50 Mo. 302; *Rains v. St. Louis R. R. Co.*, 71 Mo. 164, 36 Amer. Rep. 459; *Pittsburg R. R. Co. v. Sentmeyer*, 92 Pa. St. 276, 37 Amer. Rep. 684; *Clark v. Richmond R. R. Co.*, 78 Va. 709, 49 Amer. Rep. 394; *Randall v. B. & O. R. R. Co.*, 109 U. S. 485, 3 Sup. Ct. Rep. 322; 2 Thomp. Neg. 1008; *Mich. Cent. R. R. Co. v. Austin*, 40 Mich. 247.

The contributory negligence of the plaintiff barred his recovery. *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, 656, 6 Sup. Ct. Rep. 590; *Gibson v. Erie R. R. Co.*, 63 N. Y. 449, 453, 454; *Beach*, Contrib. Neg. 55; *Martenson v. Chicago, etc., R. R. Co.*, 15 N. W. Rep. 569.

The evidence here was such that the question was for the court. 2 Thomp. Neg. 1236; *Williams v. N. P. R. R. Co.*, 3 Dak. 168, 14 N. W. Rep. 97; *Pierce*, 315, 316; *Lake Shore, etc., v. Miller*, 25 Mich. 274; *Mares v. N. P. R. R. Co.*, 21 N. W. Rep. 5-8; *Albert v. Chicago & M. Ry. Co.*, 30 Minn. 484, 16 N. W. Rep. 266; *Randall v. B. & O. R. R.*, 109 U. S. 485, 3 Sup. Ct. Rep. 322; *Waterbury v. N. Y., etc., R. R. Co.*, 17 Fed. Rep. 683, note, § 7; *Id.* p. 685, note 2.

THOMAS, J. This action was brought by the plaintiff, Herman Boss, against the defendant, the Northern Pacific Railroad Company, in the district court of Cass county, to recover damages for personal injuries received by him through the alleged negligence of defendant's servants.

The testimony, as disclosed by the record, tends to show the following facts: On the 15th day of December, 1885, the plaintiff was severely injured by being struck by the switch-signal which stood at a point in defendant's yard at Fargo, between the round-house and depot. On the day of the accident plaintiff was at work for defendant as a section hand, and was employed, with others, in handling wood near the shop or round-house. Shortly after noon, the plaintiff, with his co-laborers, boarded one of defendant's trains, to go some distance down the railway track to dinner. This was the usual mode of going to dinner by the employees, adopted at the instance and request of the foreman under whom they worked, in order to get back to their work in proper time. The plaintiff, together with his co-employees and other persons, got upon the front platform of the caboose on this train, and, owing to the great number of persons standing on this platform, was forced to stand on the bottom step thereof, and was in this position when the train moved out, and was struck in the back of the head while the train was in motion by the lever or signal of a switch that stood in the yard, and near the track on which the train was moving. The stroke knocked him senseless and from the train. This switch-signal was constructed within four feet of the railway track, and, when in an upright position, was that distance from said track, but when in a leaning or slanting position was so near as to come in contact with the sides of the cars as they passed along the railroad track; and on the day of the accident this lever or signal scraped the sides of the cars of the train on which plaintiff was riding.

There is some testimony tending to show that this kind of a switch-signal should have been placed at least six feet from the railroad track in order to be safe, and that such was the distance that they were generally placed by all railroad companies.

The situation and condition of this switch-signal was known to the defendant, while the plaintiff had no knowledge of it whatever.

The case was tried to a jury, and upon motion of defendant

the district court directed a verdict in its favor. Appellant appeals from the judgment of the lower court in favor of defendant, and from an order denying plaintiff's motion to set aside the verdict and grant a new trial, which motion was based on a statement of the case and affidavits of plaintiff and one Bowman. To all of said rulings the plaintiff duly excepted.

The principal contention of plaintiff is that, under the evidence, he was entitled to have the case submitted to the jury, and the court therefore erred in directing a verdict for defendant. We think that under the evidence, as we view it, plaintiff was rightfully on the train, and therefore not in the position of a trespasser, and the railroad company was bound to use ordinary care and diligence for his safety, in default of which it would be liable for his injury, unless he contributed to it by his own culpable negligence.

We think that there is some evidence tending to show want of ordinary care and skill on the part of defendant in the construction of said switch-signal, which was so close to the track as to jeopardize passengers on its trains. We are also of the opinion that the evidence is not of that character which would warrant the district court in holding as a matter of law that the plaintiff was guilty of contributory negligence in bringing about the accident. It may have been negligence to stand on the steps of the platform while the train was in motion, but it was not of such a character as to be the proximate cause of the injury, for he had the right to believe that there was no such obstruction in proximity of the train as the one that inflicted the injury. He had the right to presume that the defendant's railway track was free from such dangers.

If he had been jostled from the train, or had been pushed therefrom by his co-employees, then his negligence in standing on the platform would have perhaps so far contributed to the injury as to prevent a recovery. It not infrequently happens that the injury complained of is so clearly traceable to the misconduct or negligence of the plaintiff that it is the duty of the court to apply the law to the facts without the intervention of a jury;

but in the case at bar the facts are by no means of that character, and the case should have been submitted to the jury, under proper instructions from the court.

The principles announced in the foregoing opinion are so familiar, and so elementary in character, that we deem it unnecessary to cite any authorities in support of them.

The court erred in directing a verdict in favor of defendant, and the judgment, for that reason, is reversed, and a new trial ordered in accordance with the views expressed in this opinion. All the justices concurring.

BERTELSON, Respondent, v. CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, Appellant.

1. Railroads—Personal Injuries on Track—Contributory Negligence—What Constitutes.

In an action against a railroad company for causing the death of plaintiff's decedent by crushing him between cars at or near a crossing. It appeared the track on which the accident occurred was used to stand cars on: and that it was not a public crossing, but its use had been acquiesced in by the company, and the cars were usually separated at that point. On this occasion they were two or three feet apart, and, as the decedent approached the opening, a train at the other end of the cars was backing towards it at the rate of two or three miles an hour, and as he got onto the track he was caught, and the injuries inflicted. There was nothing to prevent the approaching train being seen and heard by the decedent, who it appeared was in full possession of his faculties. *Held*, that even though the company's servants were negligent in not observing the opening and decedent's approach, and also in their omission to ring the bell and blow the whistle, still the decedent was guilty of such contributory negligence as would prevent a recovery.

2. Same—Pleading—Proof—Question for Court.

Where gross negligence is not alleged in the complaint, and the proof does not tend to establish it, it is error to submit the matter to the jury.

3. Same—Trial—Instructions.

It is error for the court in its charge to call attention to assumed facts of which there is no proof.

(Argued February 8, 1888; reversed February 24; opinion filed October 2, 1888.)

Appeal from the district court of Turner county; Hon. C. S. PALMER, Judge.

On the subject of gross negligence the court charged the jury as follows:

"Whether or not these defendants were guilty of gross negligence, willful carelessness, or as some of the authorities see fit to describe it, 'reckless management of their train,' is a question of fact for you to determine from the evidence. It is only in case you find they were exercising such a want of care that their acts became willful recklessness, that the plaintiff would be entitled to recover; and in determining this question of the degree of care, or the want of care, or gross negligence and willful carelessness of the defendant's agents, if any such existed, you have a right to take into consideration all of the evidence that has been given upon this point,—whether or not the bell was rung; the evidence as to the rapidity at which that train was being backed down; the grade upon which the train was running; the number of hands that were upon the train, and their position upon the train,—take them all into consideration, and determine, if you can, whether or not under the circumstances the agents of the defendant were guilty of gross negligence."

J. W. Cary, C. H. Winsor, (Burton Hanson, of counsel,) for appellant.

There was no negligence on the part of the appellant.

The deceased was not in the exercise of proper care, but was guilty of such negligence as will preclude a recovery in this case. *Gunn v. Wisconsin & M. Ry. Co.*, 35 N. W. Rep. 281-283; *R. R. Co. v. Huston*, 95 U. S. 702; *Holland v. R. R. Co.*, 18 Fed. Rep. 247; *Scofield v. R. R. Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125.

The court should have directed a verdict for appellant. *Miller v. Ry. Co.*, 25 Mich. 274; *O'Donnell v. Ry. Co.*, 8 Cen. L. Jou. 414; *Pinchin v. Ry. Co.*, 13 N. E. Rep. 677; *Salter v. Ry. Co.*,

75 N. Y. 273; *Gorton v. Ry. Co.*, 45 N. Y. 660; *Wilds v. Ry. Co.*, 24 N. Y. 440; *Schaefer v. Ry. Co.*, 62 Ia. 624, 17 N. W. Rep. 893; *Griffin v. Ry. Co.*, 68 Ia. 638, 27 N. W. Rep. 792; *Mantel v. Ry. Co.*, 33 Minn. 62, 21 N. W. Rep. 853; *Haas v. Ry. Co.*, 47 Mich. 402, 11 N. W. Rep. 216; *Adams v. Ry. Co.*, 19 Amer. & Eng. R. Cas. 376; *Miller v. Ry. Co.*, 25 Mich. 274; *Seefeld v. Ry. Co.*, 35 N. W. Rep. 278; *Rogstad v. Ry. Co.*, 31 Minn. 208, 17 N. W. Rep. 287; *Grethen v. Ry. Co.*, 22 Fed. Rep. 609.

The court erred in submitting to the jury the question whether or not the appellant was guilty of "willful carelessness." It was not alleged in the complaint, nor was it proved or attempted to be proved. *Letcher v. Ry. Co.*, 12 Amer. & E. R. Cas. 61; *Eyser v. Telegraph Co.*, 91 U. S. 495; *Spaulding v. Ry. Co.*, 38 Wis. 593.

Frank R. Aikens, for respondent.

The appellant's servants were guilty of gross negligence.

The public had a right to use this foot-path, and the deceased was not a trespasser. *Byrne v. N. Y. C. & H. R. R. R.*, 104 N. Y. 362, 10 N. E. Rep. 539; *Barry v. N. Y. C. & H. R. R. R.*, 92 N. Y. 298; *Taylor v. D. & H. C. Co.*, 4 Cent. Rep. 628; *Delaney v. M. & St. P. Ry. Co.*, 33 Wis. 67; *Greany v. L. I. R. R. Co.*, 101 N. Y. 362, 5 N. E. Rep. 425; *Culhane v. N. Y. C. & H. R. R. R. Co.*, 60 N. Y. 137; *Bonnell v. D., L. & W. R. R. Co.*, cited in 1 Thomp. Neg. 404; *Ernst v. H. R. R. R. Co.*, 39 N. Y. 61; *Gugenheime v. L. S. & M. S. R. R. Co.*, (Mich.) 33 N. W. Rep. 161.

Appellant should have known of the opening. Their employes were bound to tell them, (C. C. § 1368,) and, had they had a lookout, they would have discovered deceased in time to have saved his life. The evidence clearly discloses gross negligence of such a character as to imply a disregard of consequences, and, admitting (for sake of argument only) that decedent was not exercising ordinary care, yet plaintiff could recover. *Dukeman v. Wabash, St. L. & P. R. R. Co.*, (Mo.) 4 S. W. Rep. 396; *Duffy*

v. Missouri Pac. R. Co., (Mo.) 2 West. Rep. 198; *Donahue v. St. L., I. M. & S. R. R. Co.*, 50 Mo. 461; *Burnham v. St. L., etc., R. R. Co.*, 56 Mo. 338; *Kelly v. Hannibal, etc., R. R. Co.*, 75 Mo. 138; *Balt. & Ohio R. R. Co. v. State*, 33 Md. 542; *Terre Haute & I. R. R. Co. v. Graham*, 95 Ind. 286; *Cooper v. L. S. & M. S. R. R.*, 33 N. W. Rep. 310; *Furley v. C., R. I. & P. Ry. Co.*, 9 N. W. Rep. 230; *Johnson v. C. & N. W. Ry. Co.*, 49 Wis. 529, 5 N. W. Rep. 886; *Townley v. C., M. & St. P. Ry. Co.*, 53 Wis. 626, 11 N. W. Rep. 55; *Denver & R. G. Ry. v. Henderson*, 13 Pac. Rep. 910; *Frazer v. South & North Ala. R. R. Co.*, 1 So. Rep. 85; *Lafayette & I. R. R. Co. v. Adams*, 26 Ind. 76; *Indianapolis, etc., R. R. Co. v. McCluer*, Id. 370; *Dukeman v. Wabash, S. L. & P. R. R. Co.*, 4 S. W. Rep. 396.

In any phase of the case the court was justified in submitting the question of contributory negligence to the jury.

The doctrine of contributory negligence is one of the most confused departments of jurisprudence. Deering, Negligence, § 12.

Each case depends upon its own peculiar facts and circumstances. *Thompson v. Bridgwater*, 7 Pick. 188; *Ernst v. Hudson R. R. R. Co.*, 39 N. Y. 61; *Pa. R. R. Co. v. Ogier*, 35 Pa. St. 60; *Pa. R. R. Co. v. Coon*, 3 Atl. Rep. 234; *Craig v. N. Y. & N. H. R. R. Co.*, 118 Mass. 432; *Williams v. Grealey*, 112 Mass. 432; *Com. v. Met. R. R. Co.*, 107 Mass. 236; *French v. Taunton Branch R. R. Co.*, 116 Mass. 539; *Com. v. Fitchburg R. R. Co.*, 10 Allen, 191.

When there is any evidence of care or caution on the part of the person injured, or as excusing an apparent want thereof, the question of contributory negligence is for the jury. *Greany v. L. I. R. R. Co.*, 101 N. Y. 419, 5 N. E. Rep. 425; *Paine v. Grand T. Ry. Co.*, (N. H.) 1 N. E. Rep. 841.

Or where the undisputed facts relied on to establish contributory negligence are such as may lead to different conclusions. *Williams v. N. P. R. R. Co.*, (Dak.) 14 N. W. Rep. 99; *Petty v. Hannibal & St. J. R. Co.*, (Mo.) 8 West. Rep. 297; *Railroad Co. v. Stout*, 17 Wall. 673, 675; *Ewen v. C. & N. W. Ry. Co.*, 38 Wis. 613; *Hathaway v. East Tenn., etc., R. R.*, 29 Fed. Rep. 489.

The court's charge was correct. The complaint did not allege that the defendant was guilty of gross or willful negligence, nor is this necessary. *Nolton v. R. R. Co.*, 16 N. Y. 444.

It is only necessary that there was evidence to sustain the charge in this particular, not that the charge should conform to the complaint. *Berkwith v. R. R. Co.*, 64 Barb. 299-309.

Gross negligence means the absence of that care that was requisite under the circumstances. *Milwaukee, etc., R. R. Co. v. Arms*, 91 U. S. 404; *New World v. King*, 16 How. 469; *Smith v. N. Y. C. R. R. Co.*, 24 N. Y. 222; *Perkins v. R. R. Co.*, 24 N. Y. 196; *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 235.

THOMAS, J. This was an action in the district court of Turner county to recover damages for alleged wrongful killing of respondent's decedent at Marion Junction, in said county, on the 7th day of October, 1885.

Respondent's decedent was killed by being caught between two freight cars on the transfer track of appellant's railway company at the village of Marion Junction. The station platform at this station is situated between the main line of appellant's railway and the main line of the Running Water branch and a short track connected therewith. This transfer track on which the accident occurred is about 1,100 feet in length, and connects with the main line of appellant's railway east of the station platform, and with the main line of the Running Water branch west of said platform; thus running somewhat parallel with these two lines, and south of the station platform, and about 60 feet distant therefrom.

There are three traveled ways leading from the village of Marion Junction to the station platform: *First*, there is a foot-path which reaches the platform at or near the east end of the station building; *second*, there is a traveled way a little to the west of the foot-path, which reaches the station at or near the west end of said building; *third*, there is another road or street that leads down to the west end of the platform. It is about 700 feet from

the east end of the transfer track to the point where the foot-path crosses it.

It is admitted that the foot-path is not a public street laid out by authority, but the evidence shows that it was generally used by the people of the village in going to and from the station, and such use was acquiesced in by appellant; at least, it was so used with appellant's knowledge, and cars were frequently separated at the point where the path crossed the track, in order that it might be so used.

The transfer track was used to stand cars on, and to transfer them from one division to the other. When the accident occurred there were standing on this transfer track six or seven cars, consisting of stock and box cars, and one caboose. The caboose was easterly of the cars. These cars were separated near the center from 18 inches to 3 feet. As to whether the opening through which respondent's decedent attempted to pass was directly over this path, or 15 or 20 feet east of it, the evidence is conflicting.

This was the situation of affairs when appellant's mixed train of about fourteen freight cars, a baggage car, and one passenger coach came in from Running Water. This train was on time, and stopped as usual at the station platform, and left standing there the baggage car and passenger coach. The remainder of the train ran down over the east switch of the transfer track, and backed in on the transfer track in the direction of the caboose and cars, and moved at the rate of two or three miles an hour. As the train backed in, a brakeman was standing on the rear car; another on the top of the car near the engine. The rear brakeman passed the signals to the brakeman near the engine, and he in turn passed them to the person in charge of the engine. None of the train-men or employees of appellant knew of the opening between the cars standing on the siding. While this train was being thus backed down upon the track, respondent's decedent, who was on the station platform, started to cross over this transfer track in the direction of the village, and in

doing so attempted to pass between two of these freight cars standing thereon. Just as he entered the two or three feet opening between the cars, they were thrown together with such violence as to injure the decedent fatally.

There was nothing to obstruct the view of decedent, or to prevent him from seeing or hearing the movement of the train as it backed in and down this track. He was a man in the possession of all of his faculties, and the day was clear and calm, and as he started from the station platform towards the transfer track he was on the inside of the somewhat of a semicircle formed by the track, and could have seen and heard the train had he looked and listened. Others in the same vicinity both saw and heard it. He was warned just before he entered between the cars by at least two persons, who were but a short distance from him, of the approaching train, in loud tones of voice, and by vigorous gesticulations, which he did not hear, or if he heard he did not heed, but walked along with his head down as if in a study, and stepped between these cars as aforesaid. None of the trainmen or employes of appellant saw or knew the decedent was attempting to cross the track, but could have seen him before he went between the cars had they looked in that direction. The train was stopped within one-half a car's length after the alarm was given. As to whether the bell was ringing or not, the testimony is somewhat conflicting.

The above is substantially a correct statement of the facts as we gather them from the record upon which the district court, after the usual charge, submitted the case to the jury, which resulted in a verdict in favor of respondent for the sum of \$5,000, for which sum judgment was rendered by the court. In due time appellant entered a motion for a new trial based on the bill of exceptions, which was overruled. The case is here on appeal, and appellant seeks to reverse the judgment because of numerous alleged errors as set forth in the bill of exceptions, most of which relate to the charge of the court. These voluminous assignments of error, however, when stripped of their verbose drapery, may be substantially and briefly stated as follows:

First, the court erred in refusing to direct a verdict for defendant.

Second, the court erred in submitting the question of gross negligence on the part of defendant to the jury.

At least these are virtually the only errors pressed upon the attention of this court by counsel in their brief.

The first of these alleged errors, it will be observed, calls directly in question the *raison d'être* of the judgment itself, and is based on the insistent claim that the evidence is insufficient to justify the verdict in two particulars: *First*, it fails to show any negligence on behalf of appellant; *second*, the undisputed testimony shows that respondent's decedent contributed to the accident by his own culpable negligence.

It is clear that, if these propositions are true, the motion to direct a verdict for defendant should have been sustained. This would be the case if only the latter were true, unless there is some evidence tending to establish gross negligence on the part of the employees of appellant in refusing to do what was reasonably necessary to prevent the injury after they had discovered the perilous position of the deceased, in which event appellant would be liable notwithstanding the contributory negligence of deceased. We are unable, however, to discover any evidence of this character in the record.

We think there is some evidence tending to show want of ordinary skill and care on the part of appellant's agents in the management and movement of the train along the transfer track in the direction of the foot-path, under existing circumstances. They knew that this path was generally used by the public in going to and from the station, and therefore ordinary care required that they should have been on the lookout in the direction of said crossing in order to have discovered whether or not there was any one attempting to cross it, and they should also have blown the whistle and rung the bell while thus backing in upon this side track. We think the great preponderance of testimony shows that the bell was being rung at the time; but, as

there is somewhat of a conflict in the evidence on this point, we shall treat it as a fact proper for the jury.

This being true, appellant would undoubtedly be liable in damages for the injury unless the deceased contributed to the accident by his own negligence, in which event it is equally clear he cannot recover. *Railway Co. v. Houston*, 95 U. S. 702; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125; *Holland v. Railway Co.*, 18 Fed. Rep. 247; *Rogstad v. Railroad Co.*, 31 Minn. 208, 17 N. W. Rep. 287.

The question, therefore, for consideration and determination, is whether the undisputed testimony, as disclosed in the record, establishes contributory negligence on the part of the deceased. The evidence, as we view it, shows that deceased was a man in the possession of all his faculties; that he left the station platform, and walked for a distance of 60 feet towards the transfer track, on which stood some 6 or 7 box cars, which were separated at a point near the center from 18 inches to 3 feet, and attempted to pass over the track, and between these cars, and while thus going from the platform to the transfer track there was being backed in upon said track, within full view and hearing of deceased, a freight train, consisting of 14 cars and a locomotive, moving at the rate of about 3 miles an hour in the direction of the cars between which he was to pass.

Notwithstanding these facts, he either deliberately or thoughtlessly continued his walk, and stepped upon this railway track between these narrowly separated cars, just as they were thrown together by the contact of the moving train, and was caught between the bumpers, and fatally injured.

It also appears from undisputed testimony that other persons, perhaps not so favorably situated as he, both saw and heard this train as it rumbled over and along this side track, at least two of whom, who were but a short distance from him, warned him in loud tones of voice, and by vigorous gesticulations, of the approaching train, which he failed to hear or see, or at least failed to heed, but continued his walk, and stepped as it were into the

very jaws of death, looking down at the ground, seemingly oblivious to his dangerous surroundings.

It seems to us a mere statement of the facts and circumstances under which the accident occurred not only shows conclusively that deceased did not exercise due and reasonable care, but that he utterly failed to exercise any care whatever, but either deliberately, recklessly, or thoughtlessly went upon this railroad track, always to be regarded as a place of danger, and especially so under the peculiar circumstances existing at the time of the accident.

The fact that the train-men were negligent in not keeping a proper lookout, and in not ringing the bell, did not relieve the deceased of the duty and the necessity of exercising ordinary caution and care for his own safety. Want of ordinary care on the part of appellant in these particulars was no excuse for negligence on his part. It was his duty to have looked and listened in order to discover and avoid the danger of the approaching train, and not to walk heedlessly or carelessly into this place of possible danger. Had he used his senses he could not have failed to have seen and heard the train in time to have avoided the accident. If he neglected or failed to use them, and walked thoughtlessly upon the track, he was clearly guilty of culpable negligence which contributed to the accident and resultant injury, and he cannot therefore recover. If, using them, he saw the train, and yet attempted to cross the track, in the face of apparent danger, he, not the appellant, must bear the burden consequent upon his mistake and rashness.

It is well settled that a railway track is a place of danger, and a person about to go upon or over the same, whether at a public crossing or elsewhere, is bound to do that which is ordinarily needful to ascertain whether or not it is safe to do so. Otherwise they assume the risk, and, if injured, they will not be heard to complain of others.

These principles of law are so familiar and so well settled that we do not deem it necessary to buttress them with citations of authorities, but will simply refer to the case of *Railway Co. v.*

Houston, and Schofield v. Railway Co., cited *supra*, wherein this doctrine is very fully and ably discussed and upheld.

This rule, as laid down in these cases, is not only the law of this territory, but of nearly all the states of the Union where courts have had occasion to apply it. It is by no means a harsh or rigorous rule, but is just and reasonable, imposing no onerous burden or hardship on any one. Looking and listening are involuntary acts. We do both with but little or no exertion, and to do so requires the exercise of the least possible care.

This rule is not invoked in favor of diminished liability on the part of railroad companies, but, as suggested by counsel for appellant, it is a wholesome and necessary rule in favor of human life.

The application of this rule to the facts of the case at bar must of necessity result disastrously to respondent's claim, and in the reversal of the judgment of the district court. There is nothing upon which it can stand, as the evidence conclusively shows that deceased contributed to the accident by his own negligence.

As to gross negligence on behalf of appellant's employes, it is not alleged in the complaint, nor is there any testimony tending to establish it. Hence the district court erred in submitting it to the jury, and the charge of the court in reference to this question was equally erroneous, as it called the attention of the jury to assumed facts of which there was no proof.

The judgment is reversed. All the justices concurring, except PALMER, J., dissenting.

YERKES, Appellant, v. HADLEY *et al.*, Respondents.

Married Women—Mortgages—Covenants—After Acquired Title—Estoppel.

A married woman, who, in this territory, can enter into an agreement with reference to property the same as if unmarried, executed, with her husband, a mortgage containing general covenants of warranty to secure an obligation of which she was a joint debtor. After the mortgage, which, in Dakota, creates only a lien, had been foreclosed, and the mortgagee had obtained the sheriff's deed, the wife acquired title to the land. *Held*, under such a mortgage deed the title inured to the benefit of the mortgagee, and as against him she was estopped from setting it up.

(Argued May 10, 1888; opinion filed October 5, 1888.)

Appeal from the district court of Cass county; Hon. W. B. McCONNELL, Judge.

Stone & Newman, for appellant.

The foreclosure of the mortgage, and the sheriff's deed thereunder, vested in appellant the "same estate that was vested in the mortgagors at the time of the execution of the mortgage, or at any time thereafter," and such deed is a complete bar against each of the defendants. C. C. Pro. §§ 614-623.

The defendant Kate Irene Hadley, although a married woman, is competent to enter into "any engagement or transaction with any other person, respecting property, which she might, if unmarried," and is bound by all her engagements and covenants the same as if single, and the same as any other person. C. C. § 79; section 661, as amended 1881.

Section 79 places husband and wife on an absolute equality with each other. The language could not have been broader. It makes the wife liable on her covenants, on her husband's deed or mortgage, to the same extent that he is liable on his covenants in her deed. The husband has always been held liable upon his covenants in the wife's deed; and not only by way of estoppel, but in damages for breach. *Snoddy v. Leavitt*, Ind. 5 N. E. Rep. 16.

Under section 661 there can be no question as to Mrs. Hadley being bound by her covenants.

Keeping in mind that Mrs. Hadley's rights and liabilities in the case at bar are precisely the same as would be those of any other person, married or unmarried, section 632, subd. 4, provides: "Where a person purports by a proper instrument to grant real property in fee-simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successor." This provision includes a mortgage like the one at bar. *Association v. Fierra*, 48 Cal. 572.

Again, section 1727, subd. 2, declares: "Title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in the same manner as if acquired before such execution." See 48 Cal. 572, *supra*; *Orr v. Stewart*, (Cal.) 7 Pac. Rep. 639.

Kate Irene Hadley, being competent to bind herself by her covenants, is estopped to show that she assumed any less or other liability than appears on the face of the note and mortgage. Big. Est. co. 7, 11; *Sprigg v. Bank of Mount Pleasant*, 10 Pet. 257; *Herman*, Est. § 585; *Tefft v. Munson*, 57 N. Y. 97; *Honn v. McCormick*, 57 N. Y. 310; *Knight v. Thompson*, 125 Mass. 25.

Besides, the defendant Kate Irene Hadley having presumably incurred the debt secured by the mortgage on the strength of her statement and covenants, it would be inequitable to allow her, after having received the benefit, to set up her after-acquired title, and thus deprive the appellant of his security. She is estopped so to do.

The cases in which a married woman has been allowed to set up her after-acquired title as against her deed or mortgage of her husband's lands, in which she joined, place the rule upon the ground that she is not *sui juris*, and, not being competent to bind herself by the covenants in her husband's deed, she is not therefore estopped to assert her after-acquired title. Big. Est. (2d Ed.) 276; Her. Est. 581, 582; *Bank of America v. Banks*, 101

U.S. 240; *Kitchel v. Mudgett*, 37 Mich. 81; *Gregory v. Gregory*, 16 O. St. 560; *Childs v. McCesney*, 20 Ia. 431; *O'Neil v. Vanderburg*, 25 Ia. 104; *Thompson v. Merrill*, 10 N. W. Rep. 796; *Edwards v. Davenport*, 20 Fed. Rep. 756.

In Indiana, she cannot bind herself by covenants in a deed of her husband's land, nor contract except with reference to her separate estate. *Shumaker v. Johnson*, 35 Ind. 33; *Matlox v. Highlander*, 39 Ind. 95; *McCormich v. Hunter*, 50 Ind. 186; *Snoddy v. Leavitt*, 5 N. E. Rep. 13.

Taylor Crum, for respondent Mrs. Hadley.

Under C. C. § 1706, a mortgage is a mere lien and conveys no title.

In section 1736 the form of a mortgage is given, and any further provisions that may be interpolated into it are mere surplusage. The rule of the common law "that by a mortgage of real property the legal title is conveyed," is abrogated. *Everett v. Buchanan*, 2 Dak. 267, 6 N. W. Rep. 439, and 8 N. W. Rep. 31; *Davidson v. Cox*, 9 N. W. Rep. 95.

The case of *Vallejo Land Association v. Elias Viera*, cited and relied upon by counsel to sustain their position, was under a different statute.

Under the California law a mortgage could be a conveyance purporting to convey "in fee-simple absolute," while under our Code a mortgage can under no circumstances be anything more than a lien. Section 1706; *Davidson v. Cox*, *supra*.

The courts are unanimous in this: that "an outstanding paramount title subsequently acquired by the mortgagor does not inure to the benefit of the purchaser at the foreclosure sale, or to the mortgagee, although while the relation of mortgagor and mortgagee existed, a title acquired subject to the mortgage would go to strengthen the mortgage security, and that, when that relation is extinguished by foreclosure, the mortgagor is under no obligation to protect the purchaser's title." 2 Jones, Mort. §§ 1581, 1646, 1647; *Jackson v. Little*, 56 N. Y. 108, 112; *Clark v.*

Baker, 14 Cal. 627-629; *San Francisco v. Lawton*, 18 Cal. 474.

When we consider the *status* of a mortgage,—that it is only a lien, divorced from all covenants which pass with the land, and in no sense a transfer,—the doctrine of the courts in regard to judgment liens and mortgages without covenants of warrant and sale apply to mortgages under the Code. The doctrine is not, therefore, new, that an outstanding independent title, acquired after the foreclosure and sheriff's deed, does not estop the mortgagor, or inure to the benefit of the mortgagee.

So far as the mortgage proper was concerned, the words of section 1727 could have no effect after foreclosure and sheriff's deed. *Campbell v. Walpole*, 3 Dak. 184, 13 N. W. Rep. 567.

The estate of the mortgagor and judgment debtor after the sale stands upon the same footing. As to the rights of the judgment debtor, see *Everett v. Buchanan*, 2 Dak. 264, 6 N. W. Rep. 439, and 8 N. W. Rep. 31; *Thrift v. Delaney*, 10 Pac. Rep. 478.

In both cases there is the right of redemption. Section 354, C. C. Pro.

By the sheriff's deed appellant was vested with the same estate that was vested in the mortgagor at the time of the execution of the mortgage. Section 623.

The lien having been extinguished by the sale, (section 1718, C. C.,) no lien existed after the sale, and passing of the sheriff's deed; and, when there was no lien, there was no mortgagor, (as a mortgage is a lien and nothing more;) and, the mortgage having been extinguished, there could be no mortgagor or mortgagee, and consequently section 1727 does not apply in this case. *Goodenow v. Ewer*, 16 Cal. 469, 470; *Everett v. Buchanan*, 2 Dak. 267, 6 N. W. Rep. 439, and 8 N. W. Rep. 31.

The lien of a judgment attaches only to the actual interest the judgment debtor had in the land, and an after-acquired title will not inure to the purchaser at a sheriff's sale. *Westhimer v. Reid*, 15 Neb. 662, 19 N. W. Rep. 626. See, also, *Jackson v. Hagaman*, 1 Wend. 502; *Rorer*, Judicial Sales, (2d Ed.) §§ 1073, 1298-1300; *Montgomery v. Whiting*, 40 Cal. 298, 299; *Emerson v. Sansome*, 41 Cal. 555; *Kenyon v. Quinn*, Id. 329.

Mrs. Hadley would not be estopped from securing an independent outstanding title. *Kitchell v. Mudgett*, 37 Mich. 81.

It is true a married woman here stands upon an equal footing, so far as contracts are concerned, with any other person. Yet as to the homestead both husband and wife are under legal disability.

This brings the case at bar directly in line with the Michigan statute in respect to "the consenting" of the wife to the alienation of the homestead. In order for Mrs. Hadley to legally signify her consent to the mortgaging of the homestead, she must concur in and sign the same joint instrument with her husband. The instrument, thus executed, would be proper and suitable to signify her consent to the alienation. We maintain that although, in the absence of fraud, she might be liable on the covenants of warranty in the same manner, and to the same extent, as her husband, as upon a contract which she is competent to make, her liability, measured by estoppel, would not extend beyond the interest she had in the land conveyed.

This doctrine is sustained by *Snoddy v. Leavett*, 5 N. E. Rep. 16. This is the doctrine of estoppels generally. *Van Rensselaer v. Kearney*, 11 How. 326. See, also, *Leicester v. Rehoboth*, 4 Mass. 180; 6 Wait's A. & D. 679, 681; *Owen v. Bartholomew*, 9 Pick. 520; *Lounsberry v. Depew*, 28 Barb. 44; *Reynolds v. Gardner*, 66 Barb. 310.

In order to make out an estoppel, it must not only appear that the representation was made with knowledge of the facts, but the party to whom it was made must have been ignorant of the truth of the matter, and also destitute of all convenient means of acquiring such knowledge by the use of ordinary diligence. 6 Wait's A. & D. 684.

Had the plaintiff at the time of the execution of the mortgage examined the title, he would have discovered there was none.

CARLAND, J. The record in this action discloses that on and prior to December 8, 1881, Lafayette Hadley and Kate Irene Hadley, his wife, were in possession of and lived upon lot 17,

in block 4, in the city of Fargo, in this territory; that on said date they executed to Harman Yerkes their joint and several promissory note for \$500, with interest at 10 per cent. per annum, payable annually, which note was to be payable in 5 years from the date thereof. The interest to become due was evidenced by joint and several interest coupon notes, attached to said original note, and signed by the makers thereof. To secure the payment of this note, and the interest to become due thereon, said Lafayette Hadley and Kate Irene Hadley made and executed to said Harman Yerkes their mortgage on the premises hereinbefore mentioned, which mortgage was duly recorded on the said 8th day of December, 1881, as provided by law. The mortgage in form was what is termed a mortgage deed, being an absolute deed of bargain and sale, with joint covenants of seizin, quiet possession, and warranty. It also contained the usual defeasance common to such instruments. Default having been made in the conditions of said mortgage, it was duly and legally foreclosed, and the land in dispute was purchased by Harman Yerkes on the 11th day of March, 1884. No question was raised as to the regularity of the foreclosure proceedings. A sheriff's deed was duly issued to the purchaser on March 20, 1885. Claiming title through said foreclosure, Harman Yerkes commenced this action to obtain possession of said lot 17. The defendants, by their answer, averred, and such was the proof on the trial, that on the 10th day of June, 1878, the Northern Pacific Railroad conveyed said lot 17 to one A. H. Moore, which conveyance was duly recorded May 31, 1880; that said A. H. Moore conveyed said lot by quitclaim deed to Robert Hadwin, on March 11, 1879, which quitclaim deed was duly recorded August 17, 1883; that on the 12th day of June, 1885, said Robert Hadwin granted and conveyed said lot to said Kate Irene Hadley, which conveyance was duly recorded on August 15, 1885. At the trial the court found for the said defendant Kate Irene Hadley, and adjudged that she was the owner of said lot. From this judgment appellant appealed to this court.

It will be seen that the facts thus stated raise the single question as to whether the title acquired by Kate Irene Hadley subsequent to the execution and foreclosure of the mortgage given by her on the 8th day of December, 1881, inured to the benefit of the appellant, Harman Yerkes. In considering this question, we must bear in mind that Kate Irene Hadley was a joint debtor with her husband, so far as the record discloses. She signed the note, and the mortgage contained the following condition: "Provided, nevertheless, that if the parties of the first part, their heirs, executors, or administrators, shall pay or cause to be paid to the said party of the second part, his heirs, executors, administrators, or assigns, the sum of seven hundred and forty-six dollars, according to the conditions of six promissory notes of even date herewith." From all that appears from the record, Kate Irene Hadley may have received all of the consideration for the mortgage. This being so, she had the authority, under the laws of this territory, to execute a mortgage to secure said indebtedness, in the same manner as if she were unmarried. Section 661, Civil Code, as amended by section 2, c. 2, Laws 1881; section 79, Civil Code. We cannot presume that she was executing a mortgage on her husband's property, for the reason that it appears that her husband never had any ownership in the property mortgaged. Having the same rights as an unmarried woman in regard to the granting or incumbering of her property, Kate Irene Hadley could make the mortgage to Harman Yerkes, and could bind herself by any lawful covenant inserted therein, the same as any other person. The authorities which hold that a married woman may set up an after-acquired title as against her deed and mortgage, and which also hold that she is not estopped by the covenants of warranty in a deed of her husband's lands to set up an after-acquired title as against the deed which she has signed, place the rule upon the ground that she is not *sui juris*, and hence cannot be considered as authority in jurisdictions where married women may "make any engagement or transaction with any other person respecting property, which she might if un-

married." Civil Code, § 79. It must be conceded, therefore, that Kate Irene Hadley had the power to bind herself by the covenants contained in the mortgage to Yerkes. This being so, what effect would the covenants have upon title to said lot, acquired by her at any time subsequent to the execution of the mortgage? There can be no doubt but that the covenants of warranty would forever estop Kate Irene Hadley from asserting an after-acquired title to the premises in question. It would estop any other person; why not her? But it is claimed that, she having acquired the title that she sets up subsequent to the foreclosure of the mortgage, the estoppel does not apply; that, in order to have the after-acquired title inure to the benefit of the purchaser at foreclosure sale, it must have been acquired while the relation of mortgagor and mortgagee existed; and our attention is called to the case of *Jackson v. Littell*, 56 N. Y. 108. In that case the mortgage did not contain covenants of warranty, and it was decided that title acquired by the mortgagor subsequent to the foreclosure of the mortgage did not inure to the purchaser at the foreclosure sale; but the court further says: "Different considerations would apply when the mortgage contained covenants of warranty. In that case the consideration paid would represent the value of the land as warranted, and the mortgagor would be estopped from setting up an after-acquired title against which he covenanted in the mortgage." If we once admit that Kate Irene Hadley had the power to bind herself by the covenant of warranty in the mortgage, then the result naturally and necessarily follows that she never afterwards could say that she did not create a lien on the premises mentioned.

The respondent, however, insists that as a mortgage in this territory does not convey any estate in the premises mortgaged, but creates only a lien, the covenants of warranty in the mortgage in question are mere surplusage. We think that the words in the mortgage purporting to grant an estate in the premises are unnecessary, under the laws of this territory, but we cannot see why, if a mortgagor desires merely to create a lien on his

estate, he may not warrant the title to the estate upon which he proposes to create the lien. It certainly would oftentimes be an inducement to a person to loan him money. When these covenants are inserted in a mortgage it must be presumed that they form part of the consideration for which the loan was made, and for that reason the mortgagor may never say that he did not create a lien upon the premises mortgaged. Why may not the mortgagor in a mortgage which merely creates a lien covenant that he is seized in fee, and that he will forever warrant and defend the title to the premises mortgaged against the lawful claims of all persons whomsoever? Are they not covenants for the breach of which a personal liability is incurred? and, if so, has not Kate Irene Hadley broken her covenant? and, if she has broken the covenant, has not the very circumstance arisen upon which the doctrine of estoppel in these cases rests? In *Van Rensselaer v. Kearney*, 11 How. 297, the court, after reviewing all authorities, English and American, as to what words in a grant of real property would operate as an estoppel so as to prevent the grantors from setting up after-acquired title, said: "The principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication,—the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. The reason is that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him in good faith and fair dealing should be forever thereafter precluded from

gainsaying it. The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of every one. And, although it debars the truth in the particular case, and therefore is not infrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood; would be the denial of a previous affirmation upon the faith of which persons had dealt and pledged their credit, or expended their money. It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak." Adopting the reasoning of the learned court, let us look at the facts in the case at bar. Kate Irene Hadley covenanted with Harman Yerkes that she and her husband were seized in fee of the premises, and that she would warrant and defend that title against all lawful claims of any person whomsoever. She said to Harman Yerkes, and to whoever should become the purchaser at the foreclosure sale: "We are seized in fee of the land mortgaged. I will warrant and defend any title you may obtain through this mortgage." Harman Yerkes parted with his money on the strength of such representation. To now say that she could set up a title hostile to Yerkes would be to convict her of a previous falsehood, and deny an affirmation upon the faith of which Yerkes had dealt and expended his money. It is the fact that the covenant or affirmation was made, not that an estate in the premises was conveyed, that creates the estoppel. By what sort of reasoning can it be argued that the covenant is destroyed by foreclosure and sale? What destroys it? The covenant says she will forever warrant and defend; and when Kate Irene Hadley made the covenant in the mortgage in question, she forever put herself in a position in which every principle of law, reason, and morality will compel her to stand. We do not think the fact that mortgages in this territory are mere liens, and do not convey an estate in the land, makes any difference

with the operation of the covenant of warranty, when inserted in the mortgage. The mortgage operates on the estate concerning which the representations are made for the purpose of security, and the mortgage which only creates a lien may result in an absolute conveyance of the property, just as much as if the mortgage had conveyed a conditional estate in the first instance. *Clark v. Baker*, 14 Cal. 633; *Clark v. Boyreau*, Id. 636. In the case last cited the court said, referring to the case of *Clark v. Baker*, *supra*: "We there held that it was immaterial whether the mortgage was regarded as a conditional estate, as at common law, or as containing a mere lien or incumbrance, as by the law of this state; that though by our law the title does not pass, yet the lien created operates upon the property in a way precisely equivalent to that which would follow if the instrument transferred the legal title; that whatever in the instrument treating it as a conveyance would operate to transfer a subsequently acquired title to the grantee, must equally operate, treating the instrument as a lien or incumbrance, to subject such acquired interest to the purposes of the original security." The view we have taken as to the effect of the covenants contained in the mortgage in question render it unnecessary to determine the force and effect of section 1727, subd. 2, of our Civil Code, upon property acquired by the mortgagor subsequently to the execution of the mortgage. We are clearly of the opinion that—certainly as against Harman Yerkes—Kate Irene Hadley is estopped from setting up an after-acquired title to the premises in controversy, irrespective of the time when said title was acquired by her, and that judgment ought to have gone for the plaintiff at the trial. All concur.

TAYLOR et al., Respondents, v. BROWN et al., Appellants.

1. Indians—Conveyances of—Restraints on Alienation—Notice.

Lands acquired by Indians that would abandon their tribal relations. under 18 U. S. St. 420, were declared to be inalienable for five years. Such an Indian, having received a patent, which was in the usual form, without any reference to the statutory disability, or his being an Indian, executed a conveyance, within the five years, to B. *Held*, that the statute prevailed over the recitals of the patent, that purchasers must take notice thereof, and that the conveyance was void.

2. Same—Adverse Possession—Good Faith—Color of Title—Sufficiency.

Under such deed, where the grantee knew his grantor was an Indian, there was no such good faith and color of title as is required for an adverse possession to defeat a subsequent conveyance.

3. Time—Computation.

By an act of congress, 18 U. S. St. 420, under which a patent issued to an Indian, on the 15th day of June, 1880, it was declared the land should be inalienable for "five years from the date of the patent." *Held*, in computing the time, that the first day should be included, and that a conveyance made on the 15th of June, 1885, was not within the limitation, and therefore valid.

4. Same—Construction—Rule as to First Day.

In such cases there is no absolute rule of computation. "From" in its literal and restricted sense means "exclusive," but it may be used in a connection that means "inclusive;" and to prevent forfeitures, uphold *bona fide* transactions, and carry out the intention of parties, courts will always regard it as so used.

(Argued May 19, 1888; reversed May 25; opinion filed October 10, 1888.)

Appeal from the district court of Moody county; Hon. C. S. PALMER, Judge.

Gamble Bros. and *J. H. Eno*, for appellants.

As to the expiration of the limitation of the statute.

If it be claimed, as it is, that West was affected by the disabilities of the statute, outside of the terms of the patent, it would certainly follow that he was affected by its terms, and the limitation operated, on the 15th day of June, 1880, the date of

the issue of the patent to him. The title vested in him by the execution and record of the patent; it was not necessary that there should be any delivery to him. *U. S. v. Schurz*, 103 U. S. 378.

If, then, the limitations of the statute prevail over the absolute recitals of the grant, then West could not have executed a legal transfer of the property upon June 15, 1880.

It is a rule of computation that fractions of a day are to be disregarded in computations which include more than one day, and involve no questions of priority. Civil Code, § 2123. West, then, must have been affected by the limitation of the statute for the whole of the day of June 15, 1880. In other words, the limitation and disability commenced to operate at the first minute of time of June 15, 1880, and would expire the last minute of June 14, 1885.

There is no rule laid down by the Civil Code to guide us. The only suggestion that we can gain from it is in the case of minors completing the period of minority, and in that case it follows the rule above indicated. Section 10.

That the day the patent issued should be included in the computation under the act of congress, and the facts presented, see *Pugh v. Duke of Leeds*, 2 Cowp. 714; *Glassington v. Rawlins*, 3 East, 407; *Arnold v. U. S.*, 9 Cr. 119; *Gupert v. Bogart*, 18 How. 158; *Sheets v. Selden*, 2 Wall. 177; *Dutcher v. Wright*, 94 U. S. 553; *Price v. Whiteman*, 8 Cal. 412; *Lysle v. Williams*, 15 Serg. & R. 135; *Wright v. Forrestal*, 65 Wis. 341, 27 N. W. Rep. 52.

There is no unvarying rule of construction as to whether the day shall be inclusive or exclusive, and in applying the doctrine to be deduced from conflicting cases to a quasi forfeiture, as this is, a court of equity should lean against a construction which favors forfeiture. *Taylor v. Mosher*, 5 C. E. Greene, 262.

In further support of this doctrine, see *Dwarris*, Statutes, 277, 278; *Taylor's Land. & Ten.* § 78; 4 *Kent's Com.* 97; *Pratt v. Brackett*, 20 Kan. 200; *Anglesbarger v. Slapp*, 91 Ind. 311; *Kerr v. Heverstok*, 94 Ind. 178.

As to the patent being absolute on its face.

The parties to the patent, on the one hand, are the government, the grantor, and West, the patentee, who, under the treaty, upon the receipt of the patent, became a citizen of the United States, and entitled to all the privileges and immunities as such citizen. With such rights and immunities certainly would be included the right of ownership in property, and the power of alienation.

Here, then, is a patent, regular on its face, issued and delivered by the government to a citizen of that government, and it would seem to appellants that a party purchasing the land included in the patent would not be called upon by any rule of good faith or law of notice to go further than the terms of the patent itself. He was dealing with a citizen, like himself, of the same government. The patent, in all respects regular, disclosed to him that its terms were absolute; that it granted to West and to his heirs and assigns the said land, with an *habendum* "to have and to hold the said land forever." What was the purchaser to understand by "assigns?" It would certainly repeal any inference of limitation as to the power of the patentee in the disposal of the property included in the grant.

As to the effect of a patent, and its conclusiveness on all parties. The supreme court at a very early day, in the case of *Bagnell v. Brodwick*, 13 Pet. 450, decided that "congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government in reference to the public lands declares the patent the superior and conclusive evidence of legal title. Until its issuance, the fee is in the government, which, by the patent, passes to the grantee." See, also, *Gibson v. Choteau*, 13 Wall. 102; *Wilson v. Hall*, 6 Wall. 83; *Beard v. Federy*, 3 Wall. 492; *Smelting Co. v. Kemp*, 104 U. S. 640, 647; *Steele v. Smelting Co.*, 106 U. S. 450-452, 1 Sup. Ct. Rep. 389; *Maxwell Land Grant Case*, 121 U. S. 380, 7 Sup. Ct. Rep. 1015; *Moore v. Wilkinson*, 13 Cal. 487, 488; *Johnson v. Tousley*, 13 Wall. 72, 83; *Moore v. Robbins*, 96 U. S. 530; *Goodell v. Jackson*, 20 Johns. 695.

The deeds from West to Thayer, dated June 17, 1885, and from Thayer to plaintiffs, are void, under section 681, C. C. See same provision, section 147, c. 1, on Real Property, p. 2196, N. Y. Rev. St., and numerous cases cited.

It seems to us that on the uncontradicted evidence and the facts found it is conclusive that these deeds under which appellants claim are void as against defendants, even when the court omitted to find that the adverse possession was in good faith for the alleged ground that the possession was founded on void instruments, or upon any other ground. Sections 46, 48, C. C. Pro.; *Hasbrouk v. Bunce*, 62 N. Y. 482; *Hamilton v. Wright*, 37 N. Y. 502, 506; *Forman v. Peterson*, 111 Mass. 148, 151; *Edgerton v. Bird*, 6 Wis. 512; *McMohan v. Bowe*, 114 Mass. 140, 144; 2 Blackstone, (Cooley's,) 290, and note; *Livingston v. Proseus*, 2 Hill, 526; *Livingston v. Peru Iron Co.*, 9 Wend. 516.

The court, having found the facts showing adverse possession, in order to destroy the effect of these findings must have found under the law, as stated in the last case cited, that the possession was in bad faith, or obtained by fraud. This is as far as the *Peru Iron Case* goes.

No fraud or bad faith is alleged or proved, and the findings on this point are all with appellants.

The statute, both the C. C. and C. Pro., does not include the words "good faith;" and when the court finds the adverse possession as full as a good pleading, and as full as the language of the statute, it is sufficient, and entitles the appellants to a judgment declaring the deeds void under which respondents claim. Besides, the law presumes that all men act in good faith until the contrary is shown, and, in the absence of evidence, good faith and color of title under a deed is presumed, and the court will hold the title was acquired in good faith unless the contrary appears. *Brooks v. Bruyn*, 35 Ill. 392; *McCagg v. Heacock*, 42 Ill. 157; *Morrison v. Mormon*, 47 Ill. 477.

We concede the doctrine that a conveyance void on its face is not sufficient to make out a color of title. The same rule

applies to a claim under a deed obtained by fraud or forgery. "Color of title," contrary to the finding in this case, "is that which in appearance is title, but which in reality is not title;" and a claim to property under a conveyance, however incompetent the grantor may have been to convey, is a claim under color of title, and supports adverse possession. 2 Wait, A. & D. 17; *Edgerton v. Reed*, 6 Wis. 527; *Brooks v. Bryn*, 35 Ill. 392; 1 Bouvier, 335; 3 Wash. Real Pro. (3d Ed.) 138.

C. H. Winsor, for respondents.

That the prohibition of the statute attached to the patent is no longer an open question, see *Jackson v. Wood*, 7 John. 290; 15 John. 264; *St. Regis Indians v. Drum*, 19 John. 127; *Jackson v. Goodell*, 20 John. 188, Id. 693; *Lee v. Glover*, 8 Cow. 189.

The deed to Young on the 15th day of June, 1885, was within the prohibition. "In the interpretation of a statute, when an act is to be performed within a specified period from or after a day named, the general current of modern authorities as to the computation of time is to exclude the day thus designated, and include the last day of the specified period." *Sheets v. Skelden*, 2 Wall. 190; *Best v. Polk*, 18 Wall. 119; 4 Scam. 420; 28 Ill. 55; 33 Ill. 9. See, also, 3 Denio, 16; 1 Pick. 485; 2 Cow. 518, 605; 6 Cow. 659; 9 Wend. 346; 9 Mich. 154; 6 Mich. 298; 18 How. 158; 94 U. S. 553; 8 Kans. 677; 45 N. H. 39; 24 Kans. 478; 15 Kans. 164; 19 Kans. 221; 16 Iowa, 588; 14 N. W. Rep. 659; 28 Barb. 284; 4 How. Pr. 298; 75 N. Y. 240; 2 Hill, 356; 2 Denio, 164; 10 Barb. 117; 5 Wend. 137; 10 Wend. 424; 4 Wash. C. C. 232; 1 Cal. 254; 25 Cal. 122; 67 Wis. 154; 23 Ind. 48; 12 N. J. Law, 203; 12 N. J. Eq. 261; 29 N. J. Eq. 571; 2 Cow. 69; 19 Cow. 376; 37 Kan. 480; 9 N. H. 304.

That the deed was void is needless to say. The statute makes it so. *Kansas Indian Cases*, 5 Wall. 737; *Smith v. Stevens*, 10 Wall. 321; 2 Kans. 238; *Clark v. Libby*, 14 Kans. 435; *Farrington v. Wilson*, 29 Wis. 383.

No adverse possession can be founded upon a possession un-

der a deed obtained by fraud, or where there is an express prohibition of alienation, so that the deed is absolutely void. *Gibson v. Choteau*, 13 Wall. 99; Organic Act, sections 1839, 1840, 1851; *Irvine v. Marshall*, 20 How. 558; *Livingston v. The Peru Iron Co.*, 9 Wend. 511, 22 N. Y. 170.

THOMAS, J. This action was brought by the respondents against the appellants and others, in the district court of Moody county, for the purpose of removing alleged clouds upon their titles to certain real estate described in the complaint, by reason of alleged deeds of conveyance of the same lands to the appellants, which they allege to be illegal and void, and ask that they be so adjudged by the court.

The appellants, Alfred Brown and Timothy Young, were the only defendants served with process, and they served and filed separate answers, in which they set up their said titles to said real estate; and by way of counter-claims prayed that their titles be quieted, and that respondents' pretended claim to said lands be adjudged null and void.

The district court, after hearing the case, rendered judgment in favor of respondents. Appellants each moved the court for a new trial, which was refused, and they separately appeal to this court.

The facts as they appear from the findings of the district court, are substantially as follows: On the 15th day of June, 1880, one Thomas K. West, a Santee Sioux Indian became the owner of the lands described in the pleadings by a patent from the United States. The said West, being an Indian, received his title under the provisions of the statute of the United States giving certain Indians who should abandon their tribal relations the right to enter and hold lands under the homestead law.

The statute above referred to contains the following proviso: "Provided, however, that the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance, or the judgment, decree, or order of any court, and shall be and remain inalienable

for the period of five years from the day of the date of the patent therefor." 18 U. S. St. at Large, 420.

The appellants herein received deeds of conveyance from said West for three 40-acre tracts of said land some time in the year 1881. Appellant Timothy Young took a new deed from said West for the entire 160 acres, on the 15th day of June, 1885. On the 17th day of June, 1885, said West also conveyed by deed said entire tract of land to one Thayer, who on the 19th day of the same month conveyed it to the respondents. These deeds were all regular as to form, and were duly recorded in the order of their respective dates.

The main question, therefore, presented in this case, is, who is the owner of the lands in controversy? The appellants appealed separately from the judgment of the district court, which made separate findings as to them, both of whom assign a long and numerous list of alleged errors, the most of which we do not deem it necessary to consider in detail, as there are only two or three points seriously relied on by appellants to reverse the judgment of the district court.

It is contended on behalf of both the appellants that the district court erred in holding that their deeds from West, received by them in the year 1881, were void, for the reasons:

First, the patent to said West from the United States was absolute on its face, and conveyed to him a title in fee.

Second, the court erred in deciding that the deeds to Thayer, and from him to respondents, were valid, because of the adverse possession of Brown as against them. The question of the adverse possession of Brown as against Young is not raised.

In case this court should sustain the views of the district court on these points, appellant Timothy Young insists that the district court erred as a matter of law in holding that his deed of June 15, 1885, was executed within the five years from the date of the patent, and for that reason void.

It will be observed that the appellants, while taking separate appeals, are really hunting in couples, so far as this case is concerned; and therefore they make no point as to the rights of

each other, but are content if either shall succeed in obtaining judgment for the lands. Brown does not controvert the position of Young, but says, through his counsel, that he shall be content with a conclusion in favor of said Young's position, and consents in that event that judgment may be entered as prayed for by said Young.

We shall first consider the two propositions,—one of which involves the validity of deeds to appellants of date 1881; the other, the validity of deeds to respondents' grantor of date the 17th of June, 1885, as affected by the adverse possession of Brown.

The patent issued to West was in the usual form, and made no reference to the fact that he was an Indian, but was absolute on its face, and, so far as could be gathered from its contents, was a conveyance in fee, and, but for the inhibition of the statute heretofore quoted, there could be no question as to the regularity and validity of the deeds to appellants executed in 1881.

It is contended by counsel for appellants, and not without some force, that notwithstanding the limitations sought to be ingrafted on the patent by the statute, none of which were embraced or recited therein, the conveyances should be held to be good and valid, because purchasers were not bound to look *dehors* the terms of the patent, but had the right to rely upon its contents alone in order to discover the extent and scope of said West's title. This proposition, as before intimated, is not without some show of reason, and, if it were a new and original question, we should feel some hesitancy in holding otherwise; but, upon investigation, we find that the courts have frequently had occasion to pass upon this question, and they uniformly, so far as we have been able to discover, hold that statutes similar to the one sought to be invoked herein prevail over recitals of the deed or patent.

It is true it may seem to be a harsh rule that a party about to purchase lands from another cannot rely upon the title of the grantor as disclosed by the record, and perhaps it would have

been safer and less harmful to all parties had the land department seen proper to recite the limitations of the statute in the patent; but the fact that it was not done does not, in our opinion, relieve them from the effect of the law, which they are presumed to know. This law was a general one in regard to Indians in the United States, concerning their power of holding lands, and the parties purchasing of them were chargeable with notice of said law. It is the same as though the statute had said that no contracts made with the Indians residing in the United States in relation to the sale of lands, without the consent of the president or the secretary of the interior, should be valid; yet we apprehend that it will not be contended that a contract with the Indians not in compliance with such a statute could be enforced.

We do not treat the statute altogether as an attempt to limit the title of the Indian to the lands, but rather as placing upon him a disability which begins with the date of the patent, and continues for the period of five years thereafter. Hence, one dealing with the Indians in the purchase of lands must not only see that he has a good and perfect title of record, but must also see that he is not laboring under any disability which prevents him from making a good and valid deed.

We therefore conclude that it was not within the power of the Indian Thomas K. West to alienate the land in the year 1881, at which time the deeds to appellants were executed, and they therefore obtained no title by reason of these pretended conveyances.

This view of the case is upheld and discussed in the cases of *Jackson v. Goodell*, 20 Johns. 188, 693; *Lee v. Glover*, 8 Cow. 188; and *St. Regis Indians v. Drum*, 19 Johns. 127.

All of these cases passed upon similar questions to the one involved in the construction of the statute under consideration in the case at bar, and involved the power of the Indians residing in the state of New York, who held patents from the people of said state to certain lands, which upon their face purported to convey said lands in fee; yet they all hold unequivocally—including so respectable authority as the learned and renowned

Chancellor KENT—that the laws of the state which provided, in substance, that no Indian residing within the state can make any contract concerning the sale of lands within the state, or otherwise dispose of any such lands, or any interest therein, without the authority or consent of the legislature, must prevail over the recital of the patent, and hold that contracts made by these Indians for the sale of their lands not in compliance with the terms of the statute were null and void; and as these cases, so far as we have been able to discover, have not been modified or overruled by any of the more modern cases, we shall treat them as announcing the law on the subject.

We shall next consider the effect of the adverse possession of Brown upon the validity of the deed to Thayer, and of his grantees, the respondents, which were executed on the 17th and 19th of June, 1885, after the disability of the Indian had ceased to exist.

Adverse possession of land, in order to defeat or avoid a deed made subsequently to another, must be in good faith and under color of title. But can one set up color of title under a deed of conveyance which is absolutely null and void? It is clear that it cannot be done where the possession is under a deed obtained by fraud, and it seems to us equally clear that a void deed cannot initiate or be the foundation of an adverse possession that will defeat a subsequent conveyance of the land.

In the case at bar the appellant Brown came into the possession of the land under a deed that its owner had no power to make, and, as the findings of the district court show, he knew his grantor was an Indian at the time of the transaction; and therefore he is to be held to have known, at least in legal effect, of the disability resting on his grantor at the time of the pretended conveyance, for all persons are presumed to know the law. We cannot, therefore, say that he was in possession in good faith, under color of title. To hold otherwise would defeat the evident intention of the statute, and permit the appellant Brown, with the law staring him in the face, to initiate a species of deed and color of title which would in effect nullify the law,

and defeat the protection sought to be thrown around this Indian by the government, and to abrogate the conditions upon which the government parted with its title to the land.

The statute in question is a part of much similar législation on the part of the United States government since its foundation, which was enacted on the ground that the Indians were wards, and under the tutelage and care of the general government, and that such legislation was necessary to protect them in their property and rights against the superior skill and knowledge, stimulated to its utmost activity by the well-known greed and avarice, of the white man.

Hence, under all these circumstances, and the evident intention of those who enacted the statute, we are of the opinion that the deeds of 1881 were null and void, and the adverse possession of appellant Brown by reason thereof was not in law in good faith, and under such color of title as could defeat or avoid a subsequent conveyance executed after the Indian had been relieved of his disability.

But assuming, for the sake of the argument, that we are wrong in the foregoing conclusions, and that the deed is not void, but voidable only, as in cases of infants, let us look at this aspect of the case, and see what result is reached. The law worked a deprivation of the power of alienation on the part of the Indian for the period of five years, and is therefore somewhat analogous to the *status* of an infant with reference to a similar power.

As a rule, and especially in this territory, deeds of infants are voidable only; so that, if there is no disaffirmance by the infant after he attains his majority, his deed is valid, and title passes. Civil Code, §§ 15, 17; *Hastings v. Dollarkhide*, 24 Cal. 195; *Irvine v. Irvine*, 9 Wall. 617. But the giving of another deed, within a reasonable time after his disability ceases, is clearly a disaffirmance of the deed given during his infancy. 24 Cal., *supra*.

Hence, as the law permits disaffirmance by a subsequent deed which, *ex propria vigore*, makes void the prior deed, therefore the subsequent deed, made after majority, is valid, notwithstanding section 681 of the Civil Code.

If this is not true, we have the anomaly of the law both permitting and forbidding, at one and the same time, the same thing, which is not only inconsistent, but absurd; for if the first voidable deed prevents the second disaffirming deed, then no disaffirmance by an infant in this mode is permitted, though the courts hold otherwise, and the Civil Code of this territory is not *contra*.

In the case at bar the Indian Thomas K. West disaffirmed the deeds of 1881 to Brown by the subsequent deeds made to Young and Thayer, within a day or two after his disability ceased; so we must conclude, even in this aspect of the case, that the adverse possession of Brown was subject to the right of said West to disaffirm his deed to Brown by subsequent deeds, and therefore the adverse possession of Brown could not defeat or avoid them.

We shall now consider what we deem the vital point in this case, which is the question as to the effect and validity of the deed of date the 15th of June, 1885, the fifth anniversary of the date of the patent. It is contended by counsel for respondents that the 15th of June, 1885, was within the period of limitation, and the deed of that date to appellant Young gave him no title to the lands by reason of this fact; that, in the computation of time when an act is to be done, it is a well-settled rule that the first day is to be excluded; and in apparent support of this proposition cites numerous authorities.

It is clear, if this proposition is correct, the deed of that date is invalid; but we cannot agree with counsel for respondents that the rule, as he states it, is well settled; but, on the contrary, the question whether the *terminus a quo* should be excluded or included is a vexed question, and has been for a "time whereof the memory of man runneth not to the contrary," and has harassed and perplexed courts and learned doctors of both the common and civil law from the earliest times down to the present day. It has been very appropriately termed by a distinguished writer of the Roman law the *controversia controversissima*.

It is also insisted in behalf of this contention of respondents that the day *a quo* should be excluded under the provisions of our Code of Civil Procedure, which provides in section 6 that "the time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then that is also excluded. But we apprehend this rule, as laid down in the Code of Civil Procedure, only establishes the rule as to matters of practice in this territory, and does not intend to fix the rule concerning matters of a general nature to which it has no relation, and therefore has no bearing on the question under consideration.

It seems, so far as we have been able to discover from quite an extensive rummage and examination of the authorities on the subject, that the courts of both this country and England have excluded and included the *terminus a quo*; doing the one or the other as the context and subject-matter seemed to indicate and justify.

In the case of *Pugh v. Duke of Leeds*, Cowp. 714, which seems the leading case in the English courts, and which has remained the proper exposition of this vexed question, and which involved the validity of a lease, and the power reserved in a marriage settlement to one Edwards to make leases, with many restrictions and qualifications; *inter alia*, the following: "That they were not to be in reversion, remainder, or expectancy,"—the question was whether the lease was in possession, and turned upon the question of excluding or including the day of the date of the deed.

The opinion in that case was delivered by that eminent jurist, Lord MANSFIELD,—of whom it can be truthfully said he always walked, as it were, upon the mountain ranges of the law,—in which he used the following language: "I will first consider it as supposing this a new question, and that there never had existed any litigation concerning it. In that light the whole will turn upon a point of construction of the particle 'from.' The power requires no precise form to describe the commencement of the lease; the law, no technical form. All that is required is only enough to show that it is a lease in possession, and not in re-

version; and therefore, if the words used are sufficient for that purpose, the lease will be a good and valid lease. In grammatical strictness, and in the nicest propriety of speech that the English language admits of, the sense of the word 'from' must always depend upon the context and subject-matter, whether it be construed exclusive or inclusive of the *terminus a quo*. While the gentlemen at the bar were arguing this case, a hundred instances and more occurred to me, both in verse and prose, where it is used both inclusively and exclusively. If the parties in the present case had added the word 'inclusive' or 'exclusive,' the matter would have been very clear. If they had said 'from the day of the date, inclusive,' the term would have commenced immediately. If they had said 'from the day of the date, exclusive,' it would have commenced the next day. But let us see whether the context and subject-matter in this case do not show that the construction here should be inclusive as demonstratively as if the word 'inclusive' had been added. This is a lease made under a power. The lease refers to the power, and the power requires that the lease should be a lease in possession. The validity of it depends upon its being in possession, and it is made as a provision for an only daughter. He must therefore have intended to make a good lease. The expression, then, compared with the circumstances, is as strong in this respect, of what his intention was, as if he had said, 'I mean it as a lease in possession,' or 'I mean it shall be so construed.' If it is so construed, the word 'from' must be inclusive.

"This construction is to support the deeds of the parties, and give effect to their intention, and to protect property. The other is a subtlety to overturn property, and defeat the intention of the parties, without answering one good end or purpose whatever.

"To conclude, the grounds of this opinion and judgment which I now deliver is that 'from' may in vulgar use, and even in the strictest propriety of language, mean either inclusive or exclusive; that the parties necessarily understood and used it in that sense, which made their deed effectual."

We have quoted from the case *supra* at considerable length,

for the reason that we deem it a lucid and able exposition of this vexatious question, albeit his lordship may seem at first blush to have labored under great stress of judicial weather; but, in our opinion, he succeeded in severing the Gordian knot with which this question has so long been entangled, but in doing so he had to strip it of its subtleties which seemed to hang around about it, and dissipate the clouds that darkened it by reason of conflicting decisions of the courts, the which he did by letting in the sunlight of reason and common sense.

This case has since been followed in the case of *Glassington v. Rawlins*, 3 East, 407, and other English cases, and this doctrine is also upheld in the courts of this country, both federal and state. *Vide Arnold v. U. S.*, 9 Cranch, 119; *Griffith v. Boggart*, 18 How. 158; *Sheets v. Selden's Lessee*, 2 Wall. 117; *Dutcher v. Wright*, 94 U. S. 553; *Price v. Whitman*, 8 Cal. 412; *Lysle v. Williams*, 15 Serg. & R. 135; *Wright v. Forrestal*, 65 Wis. 340, 27 N. W. Rep. 52.

We do not claim that there is a uniformity of decisions of the courts of this country in regard to this question, but we admit that there is somewhat of conflict; but, from a thorough examination of them, we arrive at the following conclusion: That there is no absolute or well-settled rule of computation, but that courts will always adopt that construction which will uphold and enforce, rather than destroy, *bona fide* transactions and titles, and whenever it is necessary to prevent a forfeiture, or to effectuate the clear intention of the parties, the *dies a quo* will be included, otherwise they will be excluded.

We think that the word "from," in its literal and restricted sense, means "exclusive," but it may be used in a connection that means inclusive, and it is quite frequently used in the latter sense; and therefore in construing it courts will take into consideration the context and subject-matter, and construe it to mean either inclusive or exclusive, accordingly as it is influenced by its connection.

Applying the doctrine of the case of *Pugh v. Duke of Leeds*, and other cases cited *supra*, to the case at bar, it seems to us

that we are compelled to include the day of the date of the patent to said West, and as a matter of course decide that the 15th day of June, 1885, the day on which he conveyed the land to appellant Young, was not within the period of limitation of the statute, and therefore the deed to said Young of that date was valid.

We might properly arrive at this conclusion by treating the Indian as a minor, and applying the law of this territory in regard to minors, and hold that the disability ceased the day before the fifth anniversary of the date of the patent; but we think that the following conclusion is clearer and irresistible. It was clearly the intention of the statute under which said West obtained the patent to the lands that he should be deprived of the power to alienate it for the period of five years from the date thereof; hence, if we exclude the day of its date in the computation of the time during which he was to be deprived of this power, we place it within his power to defeat the object of the law. Suppose the patent had been issued and delivered to him at 10 o'clock A. M. of the day of its date, what was there to prevent him from alienating the land between that hour and the hour of midnight of that day, or at any time previous to the beginning of the next day, if the *terminus a quo* be excluded? in which event we would have an anomalous, incongruous, not to say absurd, statute, containing within itself seeds the germination of which might defeat its object at the very threshold of its existence; for it is absolutely certain that West could have legally conveyed the land at any time after the issuance of the patent during the day of its date, unless said day be included in the computation of the five years during which the disability or limitation was in existence.

It seems to us that this proposition is so clear and axiomatic that it is unnecessary to elaborate or discuss it at length.

We therefore conclude that the day of the date of said patent should be included, and that the deed to Young for the entire 160 acres of land is a good and valid conveyance, and the judgment of the district court is reversed, and judgment ordered to be entered

below in accordance with this opinion, and as prayed for in the separate answer and counter-claim of appellant Timothy Young.

All the justices concurring.

TERRITORY OF DAKOTA, Defendant in Error, v. WEBSTER, Plaintiff in Error.

Intoxicating Liquors, Sales of—License—City, Exclusive Right.

On an indictment for selling intoxicating liquors without a license from the county, it appeared the defendant had a license for the sale from the city where it occurred. Section 7, c. 26, Laws 1879, provided that it shall be lawful for the county commissioners of any county, and also the mayor and city council of any city therein, to require the payment of a license, and the granting of the power to license in any city shall not be held as conflicting with the provisions of this act, the intention being to allow both the county and city authorities to collect a license for the sale of intoxicating liquors. The city granting defendant the license was created by a special act in which it was given power to license, regulate, or prohibit the sale of intoxicating liquors. *Held*, the city had not the exclusive right to license such sales.

(Submitted May 21, 1888; affirmed May 25; opinion filed October 11, 1888.)

Error to the district court of Codington county; Hon. JAMES SPENCER, Judge.

The special act granting a charter to the city of Watertown was passed March 11, 1885.

W. S. Glass and *T. V. Eddy*, for plaintiff in error.

The sale is admitted, but justified under a license from the city council of Watertown. The county claims a right to collect a license under section 7, c. 26, Laws 1879. We concede that in the case of cities incorporated under chapter 24, Pol. C., this right would exist. Had the legislature, in granting the charter to the city of Watertown, granted the simple power to

license or tax, as mentioned in section 7, c. 26, Laws 1879, then perhaps there would be no conflict between the power granted to the city under the special act of March 11, 1885, and the provisions of that chapter, and both the county and city would be permitted to levy and collect a license for the sale of intoxicating liquors. But under this special act the city has the exclusive right to do so. 1 Dill. Mun. Cor. 88; *State v. Clark*, 25 N. J. Law, 54; *People v. Sponsler*, 1 Dak. 269; *State v. Andrews*, 10 N. W. Rep. 410; *Woodward v. Trumbull*, 3 Scam. 1.

C. F. Templeton, Atty. Gen., and *F. E. Van Liew*, for defendant in error.

That the two acts are not inconsistent, see Bish. St. Cr. (2d Ed.) 24; *State v. Lee*, 13 N. W. Rep. 913; *Howe v. Treasurer*, 37 N. J. L. 145, 149; *Moore v. People*, 14 How. 13; *Meyer v. State*, 13 Vroom, 145; *Wolf v. City of Lansing*, 19 N. W. Rep. 38; *Ex parte Lawrence*, 11 Pac. Rep. 217.

Among the cases cited we call attention particularly to the following language: In *State v. Lee*, 13 N. W. Rep. 915, 916, the court say: "One who is within the limits of the municipal jurisdiction, must not only obey the laws of the state, but also adjust his conduct to the requirements of the local by-laws." *Waldo v. Wallace*, 12 Ind. 584; *Wragg v. Penn. Tp.*, 94 Ill. 23; *Robbins v. People*, 95 Ill. 178; *Greenwood v. State*, 6 Bax. 567; *State v. Williams*, 11 S. C. 292; *Howe v. Plainfield*, 8 Vroom, 150; *Mayor v. Allaire*, 14 Ala. 404; *State v. Hamilton*, 3 Tex. App. 643; *Shafer v. Mumma*, 17 Md. 331; *State v. Sly*, 4 Or. 278, 279; *State v. Bergman*, 6 Or. 343; *Browsville v. Cook*, 4 Neb. 105; *McLaughlin v. Stevens*, 2 Cranch, C. C. 149.

There is no language in the special act referred to sufficient to grant the exclusive control of the sale of intoxicating liquors to the city. Charters of municipal corporations are special grants, and must be strictly construed. *Logan City v. Buck*, 2 Pac. Rep. 707; *Oakland v. Carpenter*, 13 Cal. 540; *Low v. City of Marysville*, 5 Cal. 214; *Gaines v. Coates*, 51 Miss. 335; *La-*

Jayette v. Cox, 5 Ind. 38; *Collins v. Hatch*, 18 Ohio, 523; *Le Conteux v. Buffalo*, 33 N. Y. 333.

THOMAS, J. This cause comes up on a writ of error from the district court of Codrington county, and the facts in the case are substantially as follows: The plaintiff in error, O. J. Webster, was indicted by the grand jury of said county for the alleged unlawful sale of intoxicating liquors, to which said indictment he entered a plea of not guilty. On the trial of the case he admitted that he had sold intoxicating liquors in said county without first having obtained a license from the board of county commissioners, but claimed, and it was admitted by the territory, that said sales were made within the corporate limits of the city of Watertown, and that said plaintiff in error had a license from the proper authorities of said city for the sale of liquors.

The case was submitted to the jury, and a special verdict was returned by them in accordance with the admitted facts, after which counsel for plaintiff in error entered a motion to discharge the defendant, O. J. Webster, which motion was denied by the court, as was also a motion in arrest of judgment made on the same day, and plaintiff in error was adjudged by said court to pay a fine of \$100.

It is contended by plaintiff in error that, under the facts admitted, and as found by the jury, he was guilty of no public offense, and that the district court erred in denying his motions to discharge him, and in arrest of judgment. This contention is based on the insistent fact that the city of Watertown had the exclusive right to grant licenses for the sale of intoxicating liquors within its corporate limits.

The general law of the territory regulating the sale of intoxicating liquors contains the following provision: "It shall be competent and lawful for both the county commissioners of any county, and also the mayor and city council or other authorities of any incorporated village, town, or city situated therein, to require the payment of the license herein provided; and

the granting of the power to license or tax in any city, town, or village charter shall not be held as conflicting in any way with the provisions of this act; the intention being to allow both the county and any incorporated village, town, or city authorities to levy and collect a license for the sale of intoxicating liquors as herein provided, or as provided by the charter and ordinances of such village, town, or city." Sess. Laws 1879, c. 26, § 7.

It is conceded by plaintiff in error that all villages, towns, or cities incorporated under chapter 24 of the Political Code, as well as the county, have the right to levy and collect a license for the sale of intoxicating liquors under the provisions of the act quoted *supra*; but it is contended that it is not competent or lawful for both the county and city or town to levy and collect a license in all cases for the sale of liquors where the city or town is created by special act granting a charter.

This, of course, depends upon the powers granted in the charter; and as it is contended that the city of Watertown has the exclusive right to license the sale of liquors within its corporate limits, it will be necessary to examine and interpret its charter, under which it is insisted such powers exist.

Section 26 of said charter, in reference to licensing the sales of intoxicating liquors, is as follows: "The city council of the city of Watertown shall have the power to license, tax, regulate, and prohibit auctioneers, peddlers, pawnbrokers, saloon keepers, dealers in intoxicating liquors, showmen, canvassers, circuses, shows, and exhibitions for pay, saloons, billiard halls, etc.: provided, however, they shall not grant a license to any person to sell intoxicating liquors for less than three hundred nor more than eight hundred dollars per annum."

It will be observed that the charter as quoted *supra* does not *in hæc verba* grant the city of Watertown the exclusive right to license and regulate the sale of intoxicating liquors within its corporate limits. But it is contended by counsel for plaintiff in error that the charter confers upon the city the power to prohibit the sale thereof within said city, and for that reason it has the exclusive power to license and regulate it.

We are unable to see the force of this proposition. The power to prohibit does not carry with it the power to license and regulate, *et vice versa* the power to license and regulate does not embrace the power to prohibit. They are entirely distinct and independent of each other. The legislature might have conferred the one without the other. It has seen proper to confer both upon the city of Watertown, or, rather, to have given said city the choice of these two modes of dealing with the liquor question, as they are incapable of being enforced at the same time. Prohibition prevents license and regulation, and the latter is inconsistent with prohibition. The city authorities of the city of Watertown have seen proper not to enforce prohibition within said city, but, *per contra*, have undertaken to exercise the power to license and regulate the sale of intoxicants therein. We shall therefore construe the provisions of the charter in reference to the power to license and regulate without regard to the power of prohibition.

The exclusive right of cities, towns, and villages to license and control the sale of liquor within their corporate limits is unusual, and not in harmony with the system of legislation of the territory on the subject. Hence, before we can impute to the legislature the intention of conferring such a power, the language of the charter must be clear to that effect, and susceptible of no other reasonable construction. The charter under consideration is not of this character. It simply gives to the city of Watertown the usual right to collect a license for the sale of intoxicating liquors within its limits. There is nothing in said charter that either expressly or inferentially confers upon the city the exclusive right to do this in derogation of the right of counties to collect a similar license under the general law of the territory.

We are therefore of the opinion that Codington county had the right to demand and collect a license from all persons engaged in the sale of intoxicating liquors within its limits. Hence we conclude that the plaintiff in error, not having obtained a license from the board of county commissioners of Codington county, was guilty of the offense charged in the indictment, and

the judgment of the court, based on the verdict of the jury, was proper, and the motions to discharge said Webster, and in arrest of judgment, are properly overruled.

The judgment of the district court is in all things affirmed. All the justices concurring.

**NORTHERN PACIFIC RAILROAD COMPANY, Respondent, v. RAYMOND,
Treasurer of the Territory of Dakota, Appellant.**

1. Taxation—Railroads—Gross Earnings—Statute—Constitutionality.

Chapter 99, Laws 1888, requiring railroad companies to pay a certain per cent. of all of their gross earnings in lieu of other taxes, is unconstitutional in so far as it taxes interstate commerce; that is, earnings beginning without, or terminating without, the territory.

2. Taxes—Payment—Application.

Section 1, c. 99, Laws 1888, provided that railroad companies, in lieu of other taxes, shall pay to the territorial treasurer a certain per cent. of all of their gross earnings, payable, "one-half on or before the 15th day of February, and one-half on or before the 15th day of August, in each year." On account of taxes for the year in controversy, the respondent, on the 5th of March, paid appellant a sum equal to more than three times the taxes due (or that could be constitutionally collected) for that year. *Held*, in an action to restrain the treasurer from selling property for the August installment, that the March payment operated to discharge the taxes for that year.

(Argued May, 12, 1888; affirmed May 25; opinion filed October 13, 1888.)

Appeal from the district court of Cass county; Hon. W. B. McCONNELL, Judge.

Chas. F. Templeton, Atty. Gen., for appellant.

On or before February 1, 1887, as required by law, the plaintiff filed with the defendant a statement of its gross earnings arising from the operation of its roads in this territory for the year 1886. It did not appear what portion of such earnings

arose from the operation of said roads in transporting goods or passengers through the territory, or from points without to points within, or from points within to points without, the territory. It was not until the amended complaint was served that defendant had or could have any knowledge of the separate amounts received for local and interstate transportation.

In view of recent decisions of the supreme court of the United States, particularly *Fargo v. Michigan*, 121 U. S. 230, 7 Sup. Ct. Rep. 857, and *Philadelphia Steam-Ship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118, it must be conceded that the tax on so much of the gross earnings as arose from transportation not local, (within the territory,) is a tax upon interstate commerce, and therefore unconstitutional.

Upon the face of the statements filed the tax amounted to \$76,196.62, the first half of which became due and payable February 15, 1887, and was voluntarily paid by plaintiff, March 5, 1887; the last half which became due and payable August 15, 1887, has not been paid, and defendant was proceeding to collect the same by distress when enjoined by the court in this proceeding.

The judgment of the court below, so far as it declares the amount due the territory August 15, 1887, fully paid, is clearly erroneous. There is no allegation in the complaint that it has been paid. The demurrer admits no such fact. True, there is an allegation that plaintiff, on the 5th of March, 1887, paid into the territorial treasury \$38,095.31, but it is not alleged that it was made in payment of the amount due for any particular year, or part of a year, and the court cannot presume that it was intended to satisfy the tax which defendant is now seeking to collect. In fact, the amount paid by plaintiff March 5, 1887, was paid in satisfaction of the installment which became due February 15, 1887, and was the exact amount of such installment, as appeared by the voluntary statement made by plaintiff. Up to and including that date it had been the uniform practice and custom of plaintiff to pay a percentage upon all the gross earnings of the corporation within the territory, whether local

or otherwise, and such is the plain spirit and intent of the law.

At the date of the passage of the act, such a law, in its entire scope, was recognized as valid by the supreme court of the United States. See case of *State Tax on Railway Gross Receipts*, 15 Wall. 284, which has been limited, if not entirely overruled, by *Philadelphia Steam-Ship Co. v. Pennsylvania*, 122 U. S. 226, 7 Sup. Ct. Rep. 1118.

The payment of the first installment was entirely voluntary on the part of plaintiff; there was neither fraud, duress, or mistake of fact. Taxes paid under such circumstances cannot be recovered back. *Powell v. St. Croix Co.*, 46 Wis. 210; *Shane v. St. Paul*, 26 Minn. 543, 6 N. W. Rep. 349; *Lamborn v. Co. Com'rs*, 97 U. S. 181; *Railroad Co. v. Com'rs*, 98 U. S. 541.

If no part of the amount then paid can be recovered back, it necessarily follows that no part of it can be set off against taxes subsequently due.

Ball, Wallin & Smith, J. C. Bullitt, Jr., (Jas. McNaught, of counsel,) for respondent.

Appellant concedes that the tax for the year 1886 amounted to only \$12,000. He further concedes that the respondent paid, on account of taxes for that year, the sum of \$38,095.31. Do not these two admitted facts dispose of the case?

The appellant's argument is that only half of the tax was due when the payment was made, and such payment operated only as a satisfaction of such half, leaving the remaining \$6,000 unpaid. This view is erroneous. The statute provides that the payments shall be made, one-half on or before the 15th day of February, and one-half on or before the 15th day of August, in each year. In other words, the exact times of payment were left to the respondent's convenience and choice; the sole condition being that half the amount of the tax should be paid not later than February 15th, and the remainder not later than August 15th; and, instead of the statute's prohibiting the payments before those dates, it expressly provided that they might be made prior thereto, if the respondent so desired.

The provision that the installments should be paid on or before the dates specified was intended for the benefit of railroad companies, and not the territory.

"A party may waive any provision, either of a contract or of a statute, intended for his benefit." *Shutte v. Thompson*, 15 Wall. 151, 159; *Bowen v. Aubrey*, 22 Cal. 566, 572; *People v. Robinson*, 46 Cal. 96.

FRANCOIS, J. This appeal is from an order overruling the demurrer to the amended complaint and the judgment for plaintiff.

A full statement of the case, necessary for a proper conception of the points involved therein, is found in the pleadings and record, as follows :

"AMENDED COMPLAINT.

"I. That said plaintiff is now, and at all times hereinafter named was, a corporation duly organized and existing under and by virtue of that certain act of congress approved July 2, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route,' and under those certain acts and joint resolutions of congress relating to the same subject-matter.

"II. That under and by virtue of the powers conferred on it by said acts and joint resolutions, said plaintiff has constructed, and owns, and operates, divers railroads operated by steam-power in the territory of Dakota, to-wit, that certain railroad known as the 'Northern Pacific Railroad,' which has been operated for more than five years prior to January 1, 1887; that certain railroad, known as the 'Northern Pacific, Fergus & Black Hills Railroad,' which has been operated for a period of less than five years prior to January 1, 1887; that certain railroad, known as the 'Fargo & Southwestern Railroad,' which has been operated for a period of less than five years prior to January 1, 1887; that certain railroad, known as 'Sanborn, Cooperstown & Turtle Moun-

tain Railroad,' which has been operated for a period of less than five years prior to January 1, 1887; and that certain railroad known as the 'James River Valley Railroad,' which has been operated for less than five years prior to January 1, 1887.

"III. Heretofore, to-wit, on the 9th day of March, A.D. 1883, the legislature of the territory of Dakota enacted a certain act entitled 'An act to provide for the levy and collection of taxes upon the property of railroad companies in this territory,' which, among other things, provided as follows, to-wit:

"Section 1. (*Percentage of Gross Earnings to be Paid in Lieu of Other Taxes.*) In lieu of all other taxes upon any railroads, except railroads operated by horse-power, within this territory, or upon the equipment, appurtenances, or appendages thereof, or upon any other property situated in this territory, belonging to the corporation owning or operating such railroads, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this territory a percentage of all gross earnings of the corporation owning or operating such railroad arising from the operation of such railroad as shall be situated within this territory, as hereinafter stated; that is to say, every such railroad corporation or person operating a railroad in this territory shall pay to said treasurer each year, for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per centum of the said gross earnings; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessments whatever upon the property aforesaid. The said payments shall be made one-half ($\frac{1}{2}$) on or before the 15th day of February, and one-half on or before the 15th day of August, in each year; and for the purpose of ascertaining the gross earnings aforesaid an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this territory on or before the 1st day of February in each year; the truth of which ab-

abstract shall be verified by the affidavits of the treasurer and secretary of said company. And for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts full power is hereby vested in the governor of this territory, or any other person appointed by law, to examine under oath the officers and employees of said company, or other persons; and if any person so examined by the governor, or other authorized person, shall knowingly or willfully swear falsely concerning the matters aforesaid, every such person is declared to have committed perjury. And for the purpose of securing to the territory the payment of the aforesaid per centum it is hereby declared that the territory shall have a lien upon the railroad of said company, and upon all property, estate, and effects of said company whatsoever, personal, real, or mixed. And the lien hereby secured to the territory shall have and take precedence of all demands, decrees, and judgments against said company.

"Sec. 2. (*Where Company shall Fail to Make Return.*) If any railroad company in this territory shall fail to make return of its gross earnings as aforesaid, or of any part thereof, at the time and manner provided by law, and such default shall continue during the period of thirty (30) days, such company shall be subject to a penalty in an amount equal to twenty-five (25) per cent. of the tax imposed upon such company by this act; and the treasurer of the territory shall forthwith ascertain the amount of such tax justly due from such company, as nearly as may be, from such evidence as may be available, and shall thereupon collect such tax as so ascertained, together with the said penalty thereon. The amount of tax ascertained by the territorial treasurer, as in this section provided, shall, together with the said penalty thereon, be by him entered in the books of his office; and such entry, when so made, shall stand in the place of the report required by law to be made by such company, and shall in all courts within this territory be evidence of the amount of such tax and penalty, and of the other facts stated therein, in pursuance of this act.

"Sec. 3. (*Neglect to Pay Taxes.*) In case any railroad com-

pany shall fail or neglect to pay the taxes reported by it to be due, in pursuance of this act, for the period of thirty (30) days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten (10) per centum thereof as a penalty for such failure or neglect to pay.

“ ‘Sec. 4. (*Territorial Treasurer to Distrain.*) At any time after the expiration of the period of thirty (30) days after any tax has become due and payable under the provisions of this act, the territorial treasurer, or his deputy, shall distrain sufficient goods, chattels, or other movable property, if found within this territory, to pay the taxes or per centum due from such corporation, together with the penalty thereon herein provided, and shall immediately advertise the sale of the same in at least three newspapers published within this territory, stating the time when and the place where such property shall be sold. Such sales shall take place at some point on the railroad of such delinquent company, and at least four (4) weeks' notice of the time and place of such sale shall be given. Such delinquent company, its successors and assigns, may pay any such taxes and penalty at any time before the sale of property distrained, as herein provided; and thereupon further proceedings in connection with such distress shall cease, and the property distrained be surrendered to the owner thereof.’

“IV. The total gross earnings of the said plaintiff for the year 1886 on the business of said railroads were \$2,654,756.31, distributed as follows, to-wit: On the Northern Pacific Railroad, \$2,309,549.25; on the Northern Pacific, Fergus & Black Hills Railroad, \$34,327.13; on the Fargo & Southwestern Railroad, \$192,594.47; on the Jamestown & Northern Railroad, \$69,129.97; on the Sanborn, Cooperstown & Turtle Mountain Railroad, \$29,936.36; and on the James River Valley Railroad, \$19,213.62. Said total gross earnings, to-wit, said sum of \$2,654,756.31, were composed and made up of earnings of said plaintiff on interstate business and commerce; that is to say, on business and commerce originating or beginning without said

territory, or terminating without said territory, and earnings of said plaintiff on business that was not interstate business or commerce, but was strictly local to said territory; that is to say, on business or transportation of persons and freight which originated or began at some point or points within said territory, and terminated or ended at some point or points within said territory. The part or portion of said total gross earnings, to-wit, of the sum of \$2,654,756.31, which said plaintiff earned for and upon business or transportation of persons and property, or otherwise, which originated and began within said territory, and terminated and ended within said territory, did not exceed the sum of \$400,000, and was approximately about as follows, to-wit: On the Northern Pacific Railroad, \$346,432.38; on the Northern Pacific, Fergus & Black Hills Railroad, \$5,149.07; on the Fargo & Southwestern Railroad, \$28,889.17; on the Jamestown & Northern Railroad, \$10,369.49; on the Sanborn, Cooperstown & Turtle Mountain Railroad, \$4,490.52; and on the James River Railroad, \$2,882.79. The remaining portion of said total gross earnings, to-wit, about the sum of \$2,259,425.68, were earnings which were earned by plaintiff on business that was interstate commerce; that is to say, on business or transportation of persons and property between points situated wholly without said territory; or points without and points within said territory; or points within and points without said territory.

"Heretofore, to-wit, on the 5th day of March, A. D. 1887, said plaintiff duly paid to the defendant, treasurer as aforesaid, the sum of \$38,095.81 as and for taxes on its earnings under the terms and provisions of the act last mentioned.

"V. Heretofore, to-wit, on the 15th day of August, 1887, the said defendant, treasurer as aforesaid, demanded of said plaintiff the sum of \$38,095.31, which he, the said defendant, pretended was due and payable by virtue of said act; but thereupon said plaintiff refused to pay the said sum, or any part thereof.

"VI. Afterwards, to-wit, on November 4, 1887, the said defendant, treasurer as aforesaid, at Fargo, Cass county, Dak.,

did wrongfully and unlawfully levy a pretended distress upon, and seized and took possession of, certain personal property then and there owned by and in the possession of said plaintiff, to-wit: One Mogul locomotive, No. 147; one Mogul locomotive, No. 79; one Standard locomotive, No. 347; one Standard locomotive, No. 185; one Mogul switch-engine, No. 299; one Standard engine, No. 159; one Standard engine, No. 118; one switch-engine, No. 52,—of great value, to-wit, of the value of \$64,000.00,—pursuant to the provisions of said act, and to satisfy the pretended taxes aforesaid, to-wit, the sum of \$38,095.81, together with a certain pretended penalty thereon of \$3,809.53; and has ever since remained in the possession of the same.

“VII. Afterwards, to-wit, on November 4, 1887, the said defendant, treasurer as aforesaid, caused an advertisement to be, and the same was, published in three newspapers published in said territory, that he, the said defendant, would sell said personal property at the court-house in Fargo, Dak., on the 6th day of December, A. D. 1887, at 10 o'clock A. M., to satisfy said pretended tax and penalty as provided in said section 4 of said act.

“VIII. That, unless restrained by the order of this court, said defendant will, as plaintiff is informed and believes, sell said property at the time and place mentioned in said advertisement, to-wit, on December 6, A. D. 1887, at 10 o'clock A. M., at the court-house in Fargo, Dak., to satisfy said pretended tax and penalty.

“IX. That said plaintiff is a common carrier of goods and passengers for hire in said territory, and the said personal property, to-wit, the said engines, are essential and necessary to enable said plaintiff to carry on its business as a common carrier, and to discharge its duties as such to the public; that, if said engines are sold as aforesaid by said defendant, said plaintiff will be deprived of the possession thereof, and will be deprived of the use thereof in its said business as a common carrier; and it will not be able to purchase or procure

other engines in their place in less time than a year, for the reason that it will have to purchase such other engines from the manufacturers of railroad locomotives and engines in the United States. And all of said manufacturers now have orders for engines which will require at least a year to fill, and on account of such pressure of business none of them will be able to furnish said plaintiff with any engines in less time than a year; by reason of which the sale of said engines will inflict great and irreparable injury on the business of said plaintiff, and will cause said plaintiff great pecuniary loss, the exact amount of which cannot be computed, and will to a great extent prevent said plaintiff from engaging in its said business, and will destroy said business in part, and will cause said plaintiff great and irreparable damage, which cannot be estimated and determined in an action at law.

"X. Said defendant, James W. Raymond, treasurer as aforesaid, is furthermore financially irresponsible, and is not the owner of property and effects equal in value to the value of said engines or of said pretended tax and penalty, so that, if said engines are sold as aforesaid, said plaintiff will not be able to recover the value thereof from said defendant, and will not be able to collect any judgment therefor it may obtain against said defendant, and said defendant will be wholly unable to pay any such judgment; and if said plaintiff should pay said pretended taxes and penalty to said defendant, and should afterwards bring an action against said defendant to recover back the same, and should in any such action obtain a judgment against said defendant for the amount of said pretended tax and penalty, said defendant will be unable to pay such judgment by reason of said defendant's financial irresponsibility as aforesaid, and said plaintiff would not be able to collect the amount of such judgment, or satisfy the same by execution or otherwise; but, on the contrary, the amount of said pretended tax and penalty would be wholly and forever lost to said plaintiff.

"XI. That by reason of the premises said plaintiff has no adequate or complete remedy at law.

"Wherefore said plaintiff prays that said pretended tax and penalty, and the whole thereof, be adjudged null and void; and that said defendant, James W. Raymond, treasurer as aforesaid, his deputy and deputies, and his successor and successors in office, be perpetually restrained and enjoined from selling, or attempting to sell, said personal property, or any part thereof, to satisfy said pretended tax and penalty, or any portion thereof; that the said defendant and his deputy and deputies, and his successor and successors in office, be restrained and enjoined from selling, or attempting to sell, said property, or any part thereof, to satisfy said pretended tax and penalty, or any portion thereof, during the pendency of this suit; that said plaintiff have judgment against said defendant for the possession of said personal property, besides its costs and disbursements in this action; and that said plaintiff have such other and further relief as may be equitable and just in the premises."

"DEMURRER TO AMENDED COMPLAINT.

"And now comes the defendant in the above-entitled action, and demurs to the plaintiff's amended complaint herein, and for cause of demurrer alleges:

"That said complaint does not state facts sufficient to constitute a cause of action.

"Wherefore defendant prays judgment that this action be dismissed, and for his costs and disbursements herein.

"Dated at Fargo, Dakota, this 9th day of April, A. D. 1888."

"ORDER OVERRULING DEMURRER.

"This action having been brought to trial on the issue of law joined herein by the defendant's demurrer to the amended complaint, after hearing Charles F. Templeton, Esq., attorney general, in support of the demurrer, and Messrs. Ball, Wallin & Smith in opposition:

"Ordered, that the said demurrer be overruled; and, the defendant's said attorney having in open court elected not to an-

answer, and to stand upon his demurrer, the court directs that judgment be entered in favor of the plaintiff and against the defendant herein for the relief demanded in the amended complaint, with plaintiff's costs and disbursements.

"Done in open court, this 10th day of April, A. D. 1888.

"WM. B. McCONNELL, Judge."

"JUDGMENT.

"The order of this court having been duly made and filed, whereby the defendant's demurrer to the amended complaint was overruled, and whereby the court, after the defendant, by his counsel, had in open court elected to stand on his demurrer, directed judgment herein to be entered in favor of the plaintiff and against the defendant for the relief demanded in the complaint, together with plaintiff's costs and disbursements herein: Now, therefore, on motion of the plaintiff's attorneys, it is adjudged as follows:

"*First.* That there is no tax due for the year 1886 from the plaintiff to the territory of Dakota, under the act of the territorial legislature known as the 'Gross Earnings Law,' and referred to and set out in the amended complaint; and that such tax had been fully paid long prior to the seizure by the defendant of the personal property described in the complaint.

"*Second.* It is further adjudged that said defendant and his successor or successors in office be restrained and perpetually enjoined from selling or attempting to sell the whole or any part of the personal property described in the complaint for the tax or penalty thereon mentioned in the complaint, or for any tax or penalty based on the gross earnings of the plaintiff for the year 1886.

"*Third.* It is further adjudged that, in so far as said act of the territorial legislature referred to and set out in the complaint assumes or pretends to impose a burden or tax upon interstate commerce, viz., a tax or burden upon gross earnings or commerce originating or beginning without said territory, or terminating without said territory, the same is unconstitutional,

null, and void; and the court therefore adjudges and orders that all taxes assessed or levied upon that part of the plaintiff's gross earnings in the year 1886 which accrued upon commerce originating or beginning without said territory, or terminating without said territory, be abated, canceled, and annulled; and the defendant and all persons whomsoever are hereby perpetually restrained from collecting or attempting to collect, claiming or attempting to claim, such taxes, as due or owing from the plaintiff to the said territory.

"*Fourth.* It is further adjudged that the plaintiff have judgment against the defendant for the possession of the personal property described in the complaint, and for its costs and disbursements in this action, taxed by consent, in open court, at five dollars.

"April 10, 1888.

"By the court,

WM. B. McCONNELL, Judge."

On the 14th day of April, A. D. 1888, the defendant served upon the plaintiff's attorneys and the clerk of the district court of Cass county a notice of appeal to this court.

"ASSIGNMENT OF ERRORS.

"Appellant says there is manifest error upon the face of the record, in this:

"1. The court erred in overruling defendant's demurrer to the amended complaint, for the reason that said amended complaint does not state facts sufficient to constitute a cause of action.

"2. The judgment entered is not authorized or supported by the facts alleged in the complaint, and admitted by the answer."

The amended complaint, the allegations of which are admitted by the demurrer, and are on this appeal to be taken as true, discloses that the gross earnings of the respondent railroad company for the year 1886 (to which the amount in controversy relates) was \$2,654,756.31. That \$395,330.63 of this sum rep-

resented all the gross earnings of said respondent for said year 1886, in business originating and terminating within the territory of Dakota, leaving the sum of \$2,259,425.68 as the total of its gross earnings for said year, from business, namely, the transportation of persons and property between points situated wholly without this territory, or points without and points within this territory; or points within and points without this territory, and coming under the head of interstate commerce business.

It is clear, at the outset, and conceded by the attorney general for the appellant, that so much of the act entitled "An act to provide for the levy and collection of taxes upon the property of railroad companies in this territory," approved March 9, 1883, (Sess. Laws Dak. 1883, p. 211,) as provides for a tax, or the payment of a per centum in lieu thereof, upon the gross earnings of a railroad company operating in this territory, received for business,—the transportation of passengers and property,—not local, that is, not originating and ending wholly within this territory, but interstate, and therefore coming under the head of interstate commerce, is unconstitutional and void.

It is an intermeddling with, and an effort to tax, the earnings or proceeds arising from interstate commerce, and the attempted usurpation of a power which, under the constitution, is to be solely and exclusively exercised by congress. Among other cases, see *Fargo v. Michigan*, 121 U. S. 230-247, 7 Sup. Ct. Rep. 857; *Steam-Ship Co. v. Pennsylvania*, 122 U. S. 326-347, 7 Sup. Ct. Rep. 1118, and cases cited in court opinion.

Applying the principles asserted in these and other cases, and the controlling doctrine established by our country's most eminent tribunal, to the point now under review, it follows that the respondent railroad company in this case could neither be called upon nor compelled by the territory of Dakota to pay any tax, nor any sum in lieu thereof, upon its earnings or receipts in its interstate commerce business represented for said year 1886 by said admitted sum of \$2,259,425.68. Such earnings are not within the taxing domain of the territory.

Holding this, we necessarily, and in legal logic, reach the conclusion that the only portion of the gross earnings of the respondent for the year 1886 upon which, under said gross-earnings law, the territory could claim the per cent. in lieu of taxes, was said sum of \$395,330.63, the amount of its gross earnings for business beginning and ending in the territory of Dakota, and which, for distinctness, we will term "local business" in this territory, or business not interstate.

Manifestly the gross earnings of respondent for this local business for said year 1886, as alleged in the amended complaint, did not exceed the sum of \$400,000, and, following the allegation of the complaint, and the course of counsel, for convenience, we take this sum as the amount upon which the said respondent railroad company was to pay for said year 1886 the per centum of 3 per cent. provided for in said gross-earnings law, amounting to \$12,000.

It must be noted that the validity or constitutionality of said gross-earnings law, in its application to the gross earnings of the respondent, for what we have denominated its "local business" in this territory, is not assailed in this appeal, and is therefore neither questioned nor passed upon by this court, which, for the purposes of this appeal, takes said act or law as it exists with respect to said local earnings; its legal force in this regard being entirely conceded by counsel for both appellant and respondent, and made the basis of their contention in this case.

The real question to be determined in deciding the case is this, namely: Was any sum due from the respondent railroad company to the territorial treasurer, appellant,—that is, to the territory,—under the said gross-earnings law, for said year 1886, when the said property of the respondent was seized by the appellant?

The appellant claims as due and unpaid the sum of \$6,000, being the one-half of the amount of three per cent. on the gross earnings of the respondent from its said local business in this territory for said year 1886.

The respondent asserts that nothing is due from it to the ap-

pellant on its said local gross earnings for said year, the whole of said 3 per cent., \$12,000, having been paid by it to the territorial treasurer, the appellant, long prior to the seizure of its said property by appellant.

By the terms of said gross-earnings law the payment of the 3 per cent. is to be made, "one-half on or before the 15th day of February, and one-half on or before the 15th day of August, in each year," the per cent. for 1886 being payable in 1887.

It is alleged in said complaint, and admitted, that "on the 5th day of March, A. D. 1887, said plaintiff (respondent) duly paid to the defendant, (appellant,) treasurer as aforesaid, the sum of \$38,095.31 as and for taxes on its earnings under the terms and provisions of the act last mentioned," (said gross-earnings law.)

The plaintiff (respondent) then paid to the defendant (appellant) on that date more than three times the amount due from it to said defendant, under said gross-earnings law for said year 1886.

The court is, however, asked by the attorney general for the defendant, to hold that as only one-half of the 3 per cent. for said year 1886 was due and payable at the time said sum of \$38,095.31 was paid by the respondent to and received by the territorial treasurer, defendant, said payment operated only as the discharge or satisfaction of said one-half (\$6,000) due on the 15th day of February, 1887, and that the remaining one-half of the 3 per cent. (another \$6,000) became due and payable August 15, 1887, and has not been paid.

Such a holding would shock the conscience of equity, and is not demanded by the letter or spirit of said gross-earnings law.

The attorney general, for the defendant, (appellant,) contends that "the judgment of the court below, so far as it declares the amount due the territory August 15, 1887, 'fully paid long prior to the seizure by the defendant of the personal property described in the complaint,' is clearly erroneous. There is no allegation in the complaint that it has been paid, or any part thereof; therefore the demurrer admits no such fact. True,

there is an allegation in the complaint that plaintiff, on the 5th day of March, 1887, paid into the territorial treasury \$38,095.81, but it is not alleged that it was made in payment of the amount due for any particular year, or part of a year, and the court cannot presume that it was intended to satisfy the tax which defendant is now seeking to collect."

The attorney general, however, entirely saves us from the necessity of venturing upon any presumption, violent or otherwise, and plants us upon the solid footing of fact, when he immediately informs us in his brief that "in fact the amount paid by plaintiff, March 5, 1887, was paid in satisfaction of the installment which became due February 15, 1887, and was the exact amount of such installment, as appeared by the voluntary statement made by the plaintiff."

That the said payment of \$38,095.81, made by the respondent, March 5, 1887, related to the year 1886, is beyond question, and what we are to inquire and determine is this, namely: Did that payment discharge and satisfy only the installment of the 3 per cent. payable on or before February 15, 1887, and leave unpaid the remaining installment, payable on or before August 15, 1887, or did said payment of \$38,095.81, (which it is conceded was more than three times the amount of the full 3 per cent. due for said year 1886,) operate as a discharge and satisfaction of the two installments, or, in other words, the whole sum due for 1886?

When a payment is required to be made on or before a fixed date, it may be made on said date or at any time prior thereto. A payment to be made on or before August 15th can assuredly be made in March prior thereto. The respondent could pay the 3 per cent. in two installments, at the precise dates named in the act for that purpose, or, waiving the full extent of the limit, could avail itself of the effect of the words of limitation, and obey the law by making the payment of the whole amount for the year in one payment, or in two payments prior to the expiration of the last date fixed by the act; the evident purpose of the gross-earnings law in this particular being to provide for

the payment of the whole amount before the expiration of August 15th, and thus fix a time or limit within which the amount due for each year should be paid.

The provision for payment in installments is not so much for the benefit of the territory as for the accommodation of the railroad company; and the party to whom, or for whose benefit, a right or privilege is given by statute, may waive or surrender that right or privilege in whole or in part if he does not thereby impair, injure, or destroy the rights or benefits conferred upon, or flowing to, another, in or from said statute or other legal or equitable source.

After an examination of the case before the court I am convinced that, without resort to presumption, or the violation of any legal principles, but, rather, as a plain extraction of fact from clearly perceptible evidence, and in accord with sound legal and equitable doctrine, we may conclude that the said payment of said sum of \$38,095.31 was in satisfaction and discharge of the full amount due from the respondent railroad company to the territory under said gross-earnings law for the said year 1886.

The amount, then, claimed by the territory, and for the alleged non-payment of which the defendant, treasurer of the territory, seized the personal property of the plaintiff railroad company, had been paid prior to the date of said seizure, and before the expiration of the last date fixed or limited by the act for its payment, and at the time of said seizure nothing was due from the respondent to the territory under said gross-earnings law for said year 1886.

The demurrer was properly overruled, and the judgment for plaintiff (respondent) fully warranted by the allegations of the complaint admitted to be true by the demurrer.

The errors assigned having no substance, the judgment of the district court is affirmed.

All the justices concurring.

HARRIS, Respondent, v. WATKINS, Appellant.**1. Appeal—Justice of the Peace—Default Judgment.**

In an action before a justice of the peace, the defendant, by his attorney, on the return-day appeared and had the case continued to another time, when he again appeared and filed an answer of general denial, but the defendant himself failed to appear within the hour and until after judgment had been rendered against him. *Held* not a judgment by default, and that the defendant might appeal therefrom and have the case tried in the district court.

2. Same—Perfecting—Filing Record—Jurisdiction.

Section 96, Justice's Code, as amended, chapter 5, Laws 1881, provides that if the appeal is not filed with the clerk of the district court within 15 days after it is perfected, it shall be dismissed. It appeared the clerk received the papers within the time, but, his costs not having been paid, did not indorse them with his filing until after the time had expired. *Held*, that the district court had acquired jurisdiction and it was error to dismiss the appeal under that section.

(Submitted May 21, 1888; reversed May 25; opinion filed October 18, 1888.)

Appeal from the district court of Spink county; Hon. L. K. CHURCH, Judge.

N. D. Walling, for appellant.

When a general appearance and answer have been interposed there can be no judgment by default, but the trial must proceed on its merits. Jus. Code, §§ 42, 43. See, also, §§ 11, 12.

The appellant had perfected his appeal within the time allowed by law, and had paid the justice his fees for forwarding the transcript, yet the justice did not forward the papers to the clerk of the district court until 12 days thereafter, though the law says he must forward them within five. This neglect of the officer to perform his duty was the result of appellant's not filing the papers within 15 days from the time of perfecting the appeal. "When a party entitled to an appeal uses diligence in endeavoring to perfect the same, the law will not permit him to be deprived of it through the neglect of the officer whose duty it was to prepare the transcript." *Rep. V. R. R. v. McPherson*,

11 N. W. Rep. 739; *Dobson v. Dobson*, 7 Neb. 296. Section 96 only applies to cases where the justice has performed his duty.

"The rule is that the omission of a justice to make his return within the statutory period will not prejudice the appellant, who has himself complied with all the provisions for perfecting the appeal." Melville, Dak. Jus. 237; 5 Wait's Pr. 415.

H. C. & T. J. Walsh, for respondent.

No appeal lies from a default judgment. *Minn. H. W. v. Hedges*, 7 N. W. Rep. 531; *Strine v. Hingsbaker*, 10 N. W. Rep. 534; *Baier v. Hempull*, 20 N. W. Rep. 108; *Brayton v. County of Delaware*, 16 Ia. 44; *Trullenger v. Todd*, 5 Or. 36; *Saig v. Sharp*, Id. 538.

The defendant, having moved to open the default in the justice's court, is estopped from asserting that such judgment is not subject to be opened up on proper and timely application.

As to section 96, it is too plain to require any construction. All discretion is taken from the court. The appeal shall be dismissed.

If the statute should be considered permissive, and not mandatory, then it reposes in the court a discretion in the matter of dismissing the appeal, and matters resting in the discretion of the court are not reviewable on appeal. *Wakeman v. Price*, 3 N. Y. 434; *Danley v. Graham*, 48 N. Y. 658.

Even if it were possible to reverse this order, there is nothing before this court to warrant it in finding that the discretion of the lower court was not properly exercised.

The clerk was under no obligation to notify the defendant of the receipt of the appeal papers.

If the justice was negligent in forwarding the appeal, the Code furnished a remedy. Section 92.

FRANCIS, J. September 17, 1886, respondent commenced an action in the court of a justice of the peace to recover the sum of \$75 damages for property alleged to have been converted by the defendant. September 25, 1886, the case was set for hearing,

but, upon motion of attorney for appellant, was continued to October 1, 1886. October 1, 1886, an answer was filed on behalf of the defendant (appellant) by his attorney, denying each and every allegation contained in the complaint of the plaintiff, (respondent,) but the appellant, (defendant,) being mistaken as to the hour set for the trial, did not himself arrive at the office of the justice until 1 o'clock P. M., and not until the case had been concluded, and the justice had rendered judgment against him in favor of the plaintiff. October 25, 1886, the attorney for the defendant (appellant) appeared before the justice, and moved to have said judgment set aside, and a new trial ordered, which motion was opposed by the attorneys of the plaintiff, (respondent,) and denied by the justice. October 30, 1886, an appeal to the district court was perfected by the filing of a bond and the payment of the fees of the justice for transcript; the notice of appeal having been served and filed prior thereto. November 11, 1886, 12 days after said appeal was perfected, the clerk of the district court, to which said appeal was taken, received the transcript and papers in said action, which were forwarded to him by the justice of the peace, but the said clerk of the district court failed to indorse thereon the evidence of the filing thereof, on the ground that his costs had not been paid. November 17 1886, the plaintiff (respondent) served notice of motion to dismiss said appeal on the following grounds, namely: *First*, that "no appeal will lie from the judgment of the justice herein; the same having been rendered on default, and no motion to open the default having been made prior to the service of the notice of appeal." *Second*, that "the appeal papers have never been filed in the office of the clerk of the district court, and more than 15 days have elapsed since the appeal was perfected." November 26, 1886, (prior to the day set for the hearing of said last-mentioned motion,) the costs of said clerk of the district court were paid, and he indorsed the appeal papers as filed. December 11, 1886, said motion to dismiss said appeal was argued before Hon. LOUIS K. CHURCH, the judge of said district court, and said appeal was dismissed, with \$10 costs, and

to this ruling and order of the court the defendant (appellant) duly entered his exception. December 15, 1886, notice of appeal to this court, and undertaking, were served on the attorneys of plaintiff, (respondent,) and upon the clerk of said district court, and January 5, 1887, were filed in the office of said clerk. The following errors are assigned: "*First*, the court erred in holding that an appeal would not lie from the judgment rendered in the justice court; *second*, the court erred in holding that the failure of the justice to perform his duty would defeat appellant's rights; *third*, the court erred in dismissing the appeal."

From this record it is evident that the judgment rendered by the justice of the peace was not a judgment upon default. The defendant (appellant) appeared, by his attorney, before the justice of the peace, on the day first set for the hearing of the action, and answered the complaint of the plaintiff, and on motion of his (defendant's) attorney obtained an adjournment of the trial to another day; and the fact that he failed afterwards to appear at the trial, and that judgment was rendered against him in his absence, does not place him in default.

It also appears that while the defendant himself did not attend at the time of the trial his attorney was there present, so that the defendant was legally present at the trial, although, being in error as to the hour set for the trial, he did not in person arrive until after judgment had been rendered against him.

When a defendant appears before a justice of the peace on the return-day or other day fixed by the justice, either in person or by attorney, and answers the complaint of the plaintiff, he does not become in default if he then (the trial being had on that day) fails to offer evidence at the trial. And if the trial of the action is adjourned, after he has appeared and answered, he does not become in default if he fails to appear, either *per se* or by attorney, at the time and place to which the adjournment is had, or any other time and place thereafter, when and where the trial occurs, and try the issue raised by the complaint and answer. And he may appeal from the judgment rendered at

such trial, and will, on appeal, be entitled to have his issue tried in the district court.

It also appears that the transcript and papers which were sent up by the justice of the peace were received by the clerk of the district court 12 days after the perfecting of the appeal, and therefore within the limit of 15 days fixed for the filing of the appeal by section 96 of our Justice's Code.

When the clerk of the district court received said transcript and papers in his office, the said district court obtained jurisdiction of the case on appeal, notwithstanding the fact that (his costs not having been paid) said clerk failed to indorse thereon the evidence of filing until after the expiration of said limit of 15 days.

It, moreover, appears that said costs were actually paid to the said clerk, and his indorsement of filing placed upon the appeal papers, 15 days prior to the hearing of the motion to dismiss the appeal and its dismissal.

The district court erred in holding that the defendant (appellant) was in default in the justice's court, and in dismissing the appeal.

The judgment of the district court is reversed, and the case remanded for trial.

All the justices concurring.

KNAPP, Appellant, v. SIOUX FALLS NATIONAL BANK, Respondent.

1. Trover and Conversion — Banks and Banking — Evidence — Materiality.

The defendant bank accepted a deposit of money from the plaintiff with instructions to pay it out in satisfaction of a certain mortgage on her lands. On an issue of a compliance with these instructions, the fact of whether or not she had since paid off the mortgage, there being no allegation in the complaint of a conversion of the satisfaction piece, is immaterial.

2. Same—Forgery—Sufficiency of Evidence—Question for Court.

In such a case where the plaintiff claimed that the evidence tended to show that the satisfaction piece taken by the bank was a forgery, and the evidence thereof consisted of admissions to that effect by the cashier and attorney of the bank, *held* not sufficient to warrant the submission of the question to the jury.

3. Trial—Prima Facie Case—Question for Court—Conflict of Evidence.

To entitle a party to have his case submitted to the jury because of a conflict in the evidence, he must first have established a *prima facie* right of recovery in a proper action.

4. Same—Rule as to Submitting Case to Jury.

In every case before the evidence is left to the jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict in favor of the party producing it on whom is the burden of proof.

(Argued May 16, 1888; affirmed May 25; opinion filed October 18, 1888.)

Appeal from the district court of Minnehaha county; Hon. JAMES SPENCER, Judge.

Bailey & Davis, for appellant.

The evidence on the part of the plaintiff tended to show that Reed called upon the cashier of the bank, saw the satisfaction there and demanded it, and that the cashier refused to deliver it. He then demanded the money and was refused. These facts showed title and right of possession in the plaintiff, and tended to show a conversion of the satisfaction.

It is true the demand and refusal were denied. There being a conflict in the testimony in this respect, it should have been submitted to the jury.

This action will lie for the conversion of the satisfaction piece. It is equivalent to the action of trover. Trover would lie for the conversion of any species of personal property. 6 Wait, A. & D. 128, 155, 156; *Payne v. Elliot*, 54 Cal. 339; *Booth v. Powers*, 56 N. Y. 22; *Daggett v. Davis*, 53 Mich. 35, 18 N. W. Rep. 548; *Ayers v. French*, 41 Conn. 151; *McAllister v. Kuhn*, 96 U. S. 87.

The measure of damage was *prima facie* its face value, which was the amount of the debt it discharged. *Booth v. Powers*, 56 N. Y. 22; *Baker v. Drake*, 53 N. Y. 211; *Thayer v. Manly*, 73 N. Y. 305.

The testimony offered by the plaintiff to show that she had since been compelled to pay the money was admissible upon the question of damages.

A delivery of the money upon a forged satisfaction was a conversion of the money for which this action could be maintained. 6 Wait, Ac. & D. 133; *Griswold v. Judd*, 1 Root, (Conn.) 221.

Bankers are bound to know the signatures of those with whom they deal, and, if they pay money on forged paper, they are liable. *Weisser v. Denison*, 10 N. Y. 68; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209.

There was evidence that the satisfaction was a forgery, and the case ought to have been submitted to the jury.

H. H. Keith, for respondent.

The plaintiff wholly failed to prove a cause of action against the defendant.

The complaint alleges a conversion of the money deposited, while the evidence introduced by plaintiff clearly showed that the defendant paid the money over to Flagg pursuant to the instructions given at the time of the deposit.

Counsel for plaintiff insist that the question as to whether or not the satisfaction piece was a forgery should have been submitted to the jury, but there was no evidence whatever offered upon that subject, and consequently nothing for the jury to determine.

Conversion of the satisfaction piece was neither alleged in the complaint nor proved upon the trial; hence it is unnecessary to argue as to its property characteristics, or the measure of damages.

The plaintiff having failed to make a case against the defend-

ant within the issue, it was the duty of the court to direct a verdict for the defendant. *Schofield v. C., M. & St. P. Ry. Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125; *Randall v. B. & O. Ry. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Board of Com'rs v. Clark*, 4 Otto, 278; *Finney v. N. P. R. R. Co.*, 3 Dak. 270, 16 N. W. Rep. 500; *Algur v. Gardner*, 54 N. Y. 360; *Grand Trunk R. R. Co. v. Nichol*, 18 Mich. 170; *Hynds v. Hays*, 25 Ind. 81.

FRANCIS, J. The plaintiff in his complaint alleges, in substance:

"I. That the defendant was a banking association under the laws of the United States, and located at Sioux Falls, Dakota.

"II. That the plaintiff had assumed and become liable to pay a mortgage for \$300 to one John B. Trevor, on certain real estate in Brookings county, which she purchased subject to said mortgage. That prior to July 26, 1883, default was made in the condition of said mortgage, and foreclosure proceedings commenced by advertisement. That the plaintiff, by her agent, Thos. Reed, on the 26th day of July, 1883, met A. M. Flagg, the attorney who had said foreclosure proceedings in charge for said Trevor, at Sioux Falls, and with the defendant as a third party entered into an agreement whereby said Flagg was to procure from said Trevor a duly-executed satisfaction of said mortgage, and deliver the same to the defendant, the defendant to pay the sum of \$385 in full for the discharge of said mortgage, interest, and cost, which sum the plaintiff agreed to and did deposit with the defendant, and the defendant received the same, and promised the plaintiff that it would safely keep said sum for the plaintiff until said Trevor presented a duly-executed satisfaction of said mortgage, if within a reasonable time, and deliver the same to the defendant, then the defendant to pay over to said Trevor the sum of \$385, and to deliver said duly-executed satisfaction to the plaintiff on request; and in case said Trevor did not within a reasonable time present such satisfaction, to return the money to the plaintiff; and, although a reasonable time elapsed, the said Trevor has not presented to the

defendant such satisfaction, nor has defendant paid to plaintiff said sum of \$385, or any part thereof.

"And after such reasonable time had elapsed, the plaintiff caused said satisfaction to be demanded of the defendant, and defendant neglected and refused to deliver the same to the plaintiff, and thereafter the plaintiff demanded from the defendant the sum of \$385, and defendant utterly refused to pay the same to the plaintiff, and converted the same to its own use.

"III. That since that time the said John B. Trevor has foreclosed said mortgage, and the plaintiff will be compelled to redeem the same on or before the 22d day of August, 1885, in consequence of the defendant's failure to pay over to the plaintiff said \$385, or to deliver to plaintiff said satisfaction."

The defendant filed an amended answer, in substance as follows:

"I. Denies all the allegations of the complaint except those expressly admitted.

"II. Admits that the defendant was a banking association.

"III. Alleges that on or about July 27, 1883, one Thomas Reed and A. M. Flagg came to defendant's place of business, and said Reed stated to the cashier that he had \$385 he wished to leave with the defendant, to be paid to said Flagg when he should leave with the defendant a satisfaction piece of a certain mortgage, which he had sent for, from John B. Trevor, of New York. That defendant, to accommodate the parties, and without compensation, took said \$385 from said Reed for the purpose aforesaid. That within a few days said Flagg delivered to the defendant's cashier the satisfaction as agreed by the parties, and thereupon defendant's cashier paid to said Flagg said \$385, as directed by said Reed. That within a short time thereafter defendant's cashier delivered said satisfaction piece to B. F. Pettigrew, upon the written order of said Reed, and averred that it followed the instructions of the parties in all respects; and acted for them in good faith as an accommodation, and without pay or charge. And defendant denied all liability or plaintiff's right to recover in this action. And that there is a mis-

joinder of parties plaintiff, in this: that Thomas Reed should have been made a party plaintiff, if any one."

PLAINTIFF'S BILL OF EXCEPTIONS.

This action was tried at the November term, 1887, of the said court, on the 25th day of November, by jury, the Hon. JAMES SPENCER, Judge, presiding.

The complaint and amended answer are referred to, and made a part of these exceptions.

Thomas Reed, a witness produced by plaintiff, testified as follows:

"I reside in Arlington, Kingsbury county, Dakota. Am acquainted with the plaintiff in this case. She is mother of my wife. I know of there being a mortgage when she assumed on the north-west quarter of section thirty-one, township one hundred and one, range fifty-two, in Brookings county. There was \$885 due at the time I settled the matter under that mortgage. I was verbally appointed agent by the plaintiff to settle. She furnished me money to pay the mortgage. I came to Sioux Falls, and called on one Flagg, attorney for John B. Trevor, the holder of the mortgage, and arranged terms of settlement with him. I was led to call on Mr. Flagg by seeing the land advertised for sale in one of the papers, under a mortgage. Mr. Flagg asked me to pay him the money, and he would procure a satisfaction. I told him there was a better way; I would leave the money in the bank, so that it would be safe, and when he procured the satisfaction he could draw the money from the bank. We went to the defendant bank, and he introduced me to Mr. Norton, the cashier. I told Mr. Norton I had arranged with this gentleman, as attorney, for the amount of money I wanted to leave to satisfy a mortgage that was being foreclosed on some land, and asked him if he would receive it there until he got a satisfaction. He said he would do it, and I left him \$385, and a copy of the slip from the paper wherein this sale was advertised, showing what land the mortgage covered that the satisfaction should be for. That was a notice of advertisement of fore-

closure. There was something stated there about my acting for Harriet M. Knapp. I would not be positive that it was spoken to Mr. Norton that I was agent for her. He stood inside the counter, and I was outside. I was talking with him in regard to the money, and I think, when I paid him the money, that I made the statement whom I was acting for.

[Paper shown witness.]

"I should say that it is the notice that I left with Mr. Norton at the time that I have stated."

Plaintiff now offered notice in evidence, marked "Exhibit A," dated June 6, 1883, signed "JOHN B. TREVOR, Mortgagee," which exhibit was admitted in evidence that is referred to.

"I did not explain to him who Mrs. Knapp was. The explanation I gave was, she was the owner of the land. I informed him for what purpose I was paying this money. He said he would keep it safely until he got a proper satisfaction for the mortgage that that paper called for. About two or three months after that I wrote to the defendants asking them what was done in the matter in getting me a satisfaction. I received a reply to that letter, stating that they had received a satisfaction. Some three or four weeks after the first letter, I wrote them again, and received a reply to that.

[Paper shown witness.]

"That is a reply that I received to the second letter I have spoken of."

Letter marked "Exhibit B," and offered in evidence by plaintiff and read to the jury, as follows:

"LAW OFFICE OF HOMER H. KEITH.

"SIOUX FALLS, DAK., Oct. 22nd, 1883.

"Thos. Reed, Esq.

"DEAR SIR: I learned some time ago that there had been left with the Sioux Falls National Bank a satisfaction piece purporting to have been executed by John B. Trevor, of New York, to one Bennett. I called at the bank, and found a satisfaction piece there, purporting to have been executed by Mr.

Trevor, and found it was a forgery. The cashier did not know where Mr. Reed was, so I could not write him. I notified him not to deliver satisfaction to any one, as it was a forgery. The cashier has notified me that he received a letter from you to forward the satisfaction piece, mortgage, and note. Mr. Flagg has neither the mortgage nor notes. The written instructions to the bank was to pay the money to Flagg when satisfaction was left there, which he did as directed. The mortgage still remains a valid lien on the land. Mr. Trevor has received the money, and has given no satisfaction piece. I told the cashier I would answer the letter to you. You had better attend to the matter. The forged satisfaction will be held in the custody of the law to await the action of the grand jury.

"Very truly,

"H. H. KEITH,

"For J. B. Trevor."

"In consequence of this letter I came down to Sioux Falls the latter part of October or the first of November, 1883, and went to defendant's bank and saw Mr. Norton, and told him that I wanted my money from the bank that I had left there. He said he would not give it back; that he paid the money out as I had directed, and he thought that was all the authority he had; that I had not paid him anything for the expense in the matter; that he had complied with what I had requested him to do, and he could not give the money back to me. He said he had done just as I had requested him to do; consequently he was not liable to me for the money, and he would not pay it back. He refused to give up the satisfaction, and said that he was notified not to let that go. I could not swear positively who he said notified him. He said it was a forgery, and it was so nicely executed one couldn't hardly tell it from the original. He had it there, and showed it to me. I demanded it of him, and he said he was notified not to give it up. I told him that I wanted my money. He said he could not give it to me; that he had complied, just as I had told him, with the satisfaction. I saw this satisfac-

tion there,—the piece they claimed was the satisfaction they got. I did not know anything about whether it was a forgery or not, only as they told me.

“Question. Since then, has Mrs. Knapp paid that mortgage again?

“Defendant’s Counsel. Objected to as incompetent and immaterial.

“Court. Objection sustained.”

Plaintiff’s counsel duly excepted.

“Witness. At the time I left the money with Mr. Norton, I do not think I gave him any written instructions as to what should be done with it. To the best of my belief I left no instructions, except that I left the paper that gave a description of the mortgage that I was to get a satisfaction for.”

Charles L. Norton, called and sworn in behalf of the plaintiff, examined by Mr. Bailey, testified as follows:

“I reside in the city of Sioux Falls. Was cashier of the Sioux Falls National Bank during the years 1883, 1884, and 1885. I have a registry of the certificates of deposit of July, 1883, here. I made a certificate of deposit in this account that we are talking about. That certificate of deposit is numbered 223, and the record of it is on page eight of this register. [Page eight of register, marked ‘Exhibit C,’ and certificate, marked also ‘Exhibit C.’] I issued no certificates to anybody on that date; nobody took any certificates. This was a memorandum of deposit and kept in the bank.”

Plaintiff now put the page of record, marked “Exhibit C,” in evidence, as follows: “Date, July 28. Amount, \$385. Number, 223. Date, 27. To whom issued, Thos. S. Reed.”

“This entry is in regard to that,—a memorandum of the certificate. That is the record. The date of the entry of this certificate of deposit is July 27th, \$385; and the date of the record of the payment of it is July 28th, \$385. *Cross-Examined by Mr. Keith.* This certificate which the counsel has inquired about was made at that time by me. It was issued merely to keep a record of the transaction of this \$385 deposit by Reed

and Flagg to be turned over to Flagg upon the delivery of the satisfaction piece. There were instructions connected with the deposit. They were pinned to the certificate at the time. [Paper shown witness.] Those are the instructions. [Exhibit A shown witness.] That is the slip that was with it. The certificate of deposit, the instructions, and advertisement marked 'Exhibit A,' are the three papers that were together. These are all a part of the same transaction. These three papers were pinned together at that time in the presence of Mr. Flagg and Mr. Reed, and kept by me in the bank, for the purpose of carrying out the instructions."

The certificate of deposit, the written instructions, and advertisement of foreclosure sale, identified by witnesses, and marked "Exhibit D," offered in evidence by defendant, and read to the jury, as follows:

"EXHIBIT D.

"No. 223.

SIOUX FALLS, DAK., July 27, 1883.

“(See instructions attached.)

"This certifies that Thos. Reed has deposited in the Sioux Falls National Bank, three hundred eighty-five and 0-100 dollars.

"Credit of himself or A. M. Flagg, payable in bankable currency upon return of this certificate properly indorsed.

"385.

C. L. NORTON, Cashier."

Upon the face of which was the following indorsement: "Paid July 18th, 1883. Sioux Falls National Bank." And upon the back of which certificate was the following indorsement: "A. M. FLAGG. [Instructions attached to certificate.] \$385, deposited by Thomas Reed, to be paid over on presentation of a duly-executed satisfaction of the mortgage described in the annexed printed notice, from John B. Trevor, mortgagee."

"Witness. That signature on the back of the certificate is the signature of A. M. Flagg. He indorsed that on the 28th day of July. Mr. Flagg brought a satisfaction of mortgage on

the 28th day of July, and I paid him the money that had been deposited. At the time Mr. Flagg and Mr. Reed came to the bank there were no other or different instructions than those contained in this memorandum [Exhibit D] that had been introduced in evidence. Mr. Reed and Mr. Flagg came into the bank together, and all the business relating to the deposit of the \$385 and these instructions was all done while they were together. *Redirect Examination by Mr. Bailey.* The name of A. M. Flagg in there is in my handwriting. That was all done at the same time. These instructions came in with the money. I do not know that Mr. Reed handed them in. I could not state as to that. It came in with the money. Mr. Flagg did not hand me these instructions the next day. If I recollect right, they only left the advertisement at first, and I said, 'You will have to leave your instructions,' and Mr. Flagg and Mr. Reed stepped back and wrote the instructions, and put them with the advertisement. I think the instructions were written on a figuring pad. It was probably something on the counter. There was an order from Mr. Thomas Reed, presented to me by Mr. Pettigrew, for me to deliver up this satisfaction of mortgage."

Order produced and marked "Exhibit E," and offered (by defendant) and received in evidence, and read to the jury, as follows:

EXHIBIT E.

"SIOUX FALLS, Nov. 6, '83.

"C. L. Norton, Cashier of Sioux Falls National Bank.

"You will please let Mr. R. F. Pettigrew have the discharge left by A. M. Flagg, of mortgage on the N. W. of 31-111-52,

"And oblige,

THOS. REED."

"*Witness.* Mr. Pettigrew brought this order to me, and I handed over the satisfaction of mortgage upon the order. I could not state what date he brought it; whether it was at the date of the order or not. I had seen Mr. Reed a few days be-

fore that, and stated to him that I would give it up, but had been instructed not to. I do not recollect of ever having any talk with Mr. Keith about this affair about October 22, 1883. I think Mr. Keith did business for our bank about that time. I could not say whether I saw Mr. Reed in our bank between October 22 and November 16, 1883, or not. I could not say what date it was. I did not tell him then that I could not give up the satisfaction. He did not demand the satisfaction of me, nor did he demand the money of me. He never demanded any money or satisfaction of me. I do not recollect whether he came there to the bank on business or not. I think he was there, but I do not recollect that he had any business there. I don't remember anything that he said. He never asked me for the money. I do not think we received any letter from Mr. Reed about the 1st of October, asking for the satisfaction. I haven't any recollection of receiving any letter. I have looked over the files to see if I could find any, and I could not. I never at any time refused or declined to deliver to Mr. Reed the satisfaction or mortgage."

Thomas Reed, recalled by plaintiff, and examined by Mr. Bailey.

"[Exhibit D shown witness.] The first time I saw that was at the counter, right here in this court-room. I never handed anything of that kind to Mr. Norton. That is not my signature. [Exhibit E, shown witness.] That is not my signature. I never gave that order."

A. A. Polk, called and sworn in behalf of the plaintiff, and examined by Mr. Bailey, testified as follows:

"I came to Sioux Falls about the 1st of March, 1880, and from that time until 1883 Mr. Flagg was an active attorney in this court."

Plaintiff rests.

C. L. Norton, recalled in behalf of the defendant, examined by Mr. Keith, further testified as follows:

"There were no other instructions given me except the written ones. These instructions were either written by Mr. Flagg

or Mr. Reed at the time they were in the bank. I requested instructions in regard to the matter, and Mr. Flagg stepped to the check-desk outside of the counter, and wrote these instructions, he and Mr. Reed together, and passed them in as instructions to govern me in the transactions. I pinned the instructions, the certificate of deposit, and notice of sale together, and they have remained together ever since. Mr. Reed did not say that he was acting as agent for anybody. He did not say anything about Harriet Knapp. I never heard of Harriet Knapp until this suit was commenced. I did not state to Mr. Reed that it was a very good forgery. I never knew from what Mr. Reed said that he was going to look to the bank for the money. He never made any claim at any time before the commencement of this action against the bank for the money. *Cross-Examination by Mr. Bailey.* I never took Mr. Reed into the bank and showed him what I claimed to be the real signature of Mr. Trevor. I never showed him anything of the kind. I do not know that I ever saw Mr. Trevor's signature."

Defendant rests. Evidence closed.

The defendant's counsel asks the court to direct a verdict for the defendant.

I. The plaintiff has failed to prove a cause of action.

II. Upon the evidence, as it now stands in the case, the plaintiff is not entitled to recover.

III. The evidence tends to show that the money deposited in the Sioux Falls National Bank was in the nature of a special deposit, and the defendant, being a national bank, is not responsible, in an action of this kind, only for a gross negligence; and that it is incumbent upon the plaintiff to show, in order to make the bank responsible in any event, that it was the custom of the bank to receive special deposits, and that it came within the knowledge of the directors, and the directors approved the same; and no such proof has been shown or attempted to be shown in this case.

IV. The testimony on the part of the plaintiff tends to show and does show that the Sioux Falls National Bank, by C. L.

Norton, its cashier, received this money under written instructions, and that he followed these instructions, and paid the money over as instructed, and delivered the satisfaction piece received, in pursuance of the instructions given him by Mr. Flagg and Mr. Reed, to R. F. Pettigrew, by an order made by Mr. Reed, and presented by Mr. Pettigrew to the bank.

"Court. GENTLEMEN OF THE JURY: The court is of the opinion, under the evidence in this case, that there is no contradiction of the evidence, and no question of fact to leave to you to determine. I therefore direct you to return a verdict in favor of the defendant."

Plaintiff's counsel excepted to the direction of the verdict; whereupon the jury returned the following verdict:

"We, the jury, find all of the issues in the above-entitled action against the plaintiff and in favor of the defendant, and that the plaintiff is not entitled to recover in this action."

Afterwards, on the 25th day of November, 1887, judgment was rendered upon said verdict for the defendant, to which the plaintiff excepted.

We hereby acknowledge and stipulate that the foregoing bill of exceptions contains a fair and correct statement of all of the evidence introduced, and of all the objections taken, and motions, rulings, orders, and decisions made at the trial, and the exceptions thereto.

BAILEY & DAVIS,

Attorneys for Plaintiff.

H. H. KEITH,

Attorney for Defendant.

The foregoing bill of exceptions settled and allowed March 23, 1888.

ASSIGNMENT OF ERRORS.

I. The court erred in sustaining the objection to the question: "Since then, has Mrs. Knapp paid that mortgage again?" And in excluding testimony upon that subject.

II. The court erred in sustaining defendant's motion to direct

a verdict for the defendant upon the grounds assigned by defendant.

III. The court erred in withdrawing the case from the consideration of the jury, and directing them to return a verdict for the defendant.

(a) There was evidence tending to show a conversion of the money.

(b) There was evidence tending to show a conversion of the satisfaction.

(c) There was evidence tending to show that the satisfaction was a forgery.

(d) The evidence upon material facts was contradictory, and should have been submitted to the jury.

IV. The court erred in receiving said verdict for the defendant.

V. The court erred in rendering judgment on said verdict for the defendant.

VI. Because the verdict and judgment are against the law.

The contention of counsel for the appellant is summed up in their insistment that "the court erred in sustaining the objection to the question, 'Since then has Mrs. Knapp paid the mortgage again?' and in excluding testimony on that subject."

That "the evidence upon material facts was contradictory, and should have been submitted to the jury."

And that "the court erred in withdrawing the case from the consideration of the jury, and directing them to return a verdict for the defendant."

And "in rendering judgment on said verdict for the defendant."

Their contention falls, on being brought face to face with the record.

From an inspection of the record,—which, by stipulation of counsel and allowance of the court, contains, as part of the bill of exceptions, "a fair and correct statement of all the evidence introduced" at the trial,—we are of the opinion that whatever right of action the plaintiff (appellant) might be permitted to

maintain in the nature of *assumpsit*, or for negligence of the defendant bank as bailee, the said plaintiff, in the trial of this action against said defendant bank in the district court, failed to prove the cause of action stated in her complaint, and did not make against said defendant bank a *prima facie* case of conversion of either the money deposited with it or the mortgage satisfaction piece.

Counsel for appellant urge that "the testimony offered by the plaintiff to show that she has since been compelled to pay the money (embodied in said question: 'Since then has Mrs. Knapp paid the mortgage again?') was admissible upon the question of damages for the conversion of the satisfaction."

A complete answer to this is found in the fact that the complaint neither alleges the conversion of the satisfaction piece, nor claims damages for such conversion; and, we may add, the rejection of this question worked no injury to the plaintiff, as she failed (as already observed) to make even a *prima facie* case of conversion of the satisfaction piece or of the money, necessary to be made out in order to render the question of damage or the measure of damage material.

As to the admissibility of the said question, ruled out in the district court, had the issue and the evidence made a case of conversion, either of the money or of the satisfaction piece, or as to the damage or the measure of damage, in that event no decision is essential, and this court is therefore silent with respect thereto.

As the case stood when the lower court directed a verdict for the defendant, there was no conflict of testimony on material points.

The testimony offered on behalf of the plaintiff, (appellant,) not contradicted, but corroborated and strengthened, by that presented for the defendant, (respondent,) shows that the defendant received the money and paid it out upon a satisfaction piece in apparent accord with the instructions given when the money was deposited.

Counsel for appellant press the point that there was a con-

flict in the testimony respecting the demand for the money and for the satisfaction piece, and the refusal of the defendant to deliver either, and that this should have been submitted to the jury.

Such conflict, however, would not render necessary the submission of the case to the jury, unless there was at least a *prima facie* case of conversion to go to the jury, and in which they could determine such conflict; and, as we have seen, no such case existed in the district court when the verdict for defendant was directed.

This reasoning will apply, with equal force, to the other points upon which it is claimed for the appellant there was a contradiction or conflict in the testimony.

It is also asserted, in support of this appeal, that "there was evidence tending to show that the satisfaction was a forgery," and this should have been submitted to the jury.

It is not necessary to discuss the weight or effect of the proof that the satisfaction piece, received by the bank, (defendant,) and on receipt of which it paid out the money, was a forgery, as there was no testimony in the case on that point proper to be submitted to the jury, or from which they could have found as a fact that the said satisfaction piece was a false one; nor was the forgery of the satisfaction piece brought in issue, or alleged, either in the complaint or the answer.

An examination of the case shows that all the testimony relating to the forgery of the satisfaction piece was as follows, namely: That of Thomas Reed, for plaintiff, who, referring to C. L. Norton, cashier of the defendant bank, testified: "He said it was a forgery, and it was so nicely executed one couldn't hardly tell it from the original;" and the further testimony of said Reed: "I did not know anything about whether it was a forgery or not, only as they told me." And the statements in the letter of H. H. Keith, (Exhibit B for plaintiff:) "I called at the bank, and found a satisfaction piece there purporting to have been executed by Mr. Trevor, and found it was a forgery." "I notified him (the cashier) not to deliver satisfaction to any one, as it was a forg-

ery." "The forged satisfaction will be held in the custody of the law, to await the action of the grand jury." And the testimony of said C. L. Norton, when called in behalf of defendant: "I did not state to Mr. Reed that it was a very good forgery;" and, on cross-examination: "I never took Mr. Reed into the bank, and showed him what I claimed to be the real signature of Mr. Trevor. I never showed him anything of the kind. I do not know that I ever saw Mr. Trevor's signature."

It is evident that, even had the question of the forgery of the satisfaction piece been at issue in the case, this testimony alone would not have been sufficient to make a *prima facie* case on the point of said forgery, nor would it have presented a conflict or contradiction of material testimony to be left to the jury.

The falseness of an instrument cannot be shown by testimony of this class or extent.

The rule governing courts in directing the verdict of a jury, after the mutations incident to most rules of practice, has come to be well established in the modern development of jurisprudence. Noting the existence of cases "which go a long way to hold that, if there is the slightest tendency in any of the evidence to support plaintiff's case, it must be submitted to the jury," the court, in the case of *Improvement Co. v. Munson*, 14 Wall. 448, said: "Recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

On this same point the court in *Pleasants v. Fant*, 22 Wall. 116, 123, said: "It is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor,—that is the business of the jury; but conceding to all the evidence offered the greatest probative force which,

according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict?" The same rule is reiterated in *Schofield v. Railway Co.*, 114 U. S. 615-619, 5 Sup. Ct. Rep. 1125, (citing cases,) when the court says: "It is the settled law of this court that when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." See, also, *Marshall v. Hubbard*, 117 U. S. 415-419, 6 Sup. Ct. Rep. 806; and *Railroad Co. v. Bank*, 123 U. S. 727-739, 8 Sup. Ct. Rep. 286; and *Finney v. Railroad Co.*, 3 Dak. 270, 16 N. W. Rep. 500.

The case at bar comes within this rule. The proper verdict was one against the plaintiff, and for the defendant, and the court did not err in directing it.

Neither did the court err in rendering judgment for the defendant on return of the verdict as directed. The judgment of the district court is affirmed. All the justices concurring.

TERRITORY OF DAKOTA *ex rel.* PATRICK McMAHON v. O'CONNOR,
Deputy Sheriff of Grand Forks Co.

1. Constitutional Law—Legislative Power—Intoxicating Liquors—Local Option Law.

Chapter 70, Laws 1887, providing for the prohibition of the sale of intoxicating liquors in the several counties by local option, is not subject to any of the objections:

1. That it deprives the citizen of his property without due process of law.
2. That it conflicts with the Organic Act of the territory.
3. That it conflicts with the revenue laws of the United States, granting license to sell intoxicating liquors.
4. That it conflicts with the act of congress prohibiting the legislature from passing any law "impairing the rights of private property."
5. That it conflicts with the act of congress prohibiting local or special legislation.
6. That it conflicts with the act of congress in delegating legislative power.

2. Same—Police Power—Intoxicating Liquors, Sale of—Counties.

Such a statute is of a police nature, and a rightful subject of legislation within the power conferred by the Organic Act, and, being local in character, may be left to each county to determine when it shall be enforced therein.

3. Same—Statutes—Operation—Penalties for Violation—Habeas Corpus.

Section 5 of the act provided that "in addition to the penalties now prescribed by law any person * * * who may sell any intoxicating liquors without a license having been duly granted as provided by law, or where the license is granted in violation of this act, shall be restrained from so doing by proper injunction." *Held*, on *habeas corpus*, where the petitioner had been arrested on a complaint before a justice of the peace charging him with selling intoxicating liquors in violation of the act, that the objection that the statute provided no penalties, and could not be enforced, was not well founded.

4. Same—Enactment—Verity of Official Certificates.

Where the certificate of the presiding officer of each house shows that the act was regularly passed, and it was in proper time approved

5 397
 5 431
 5 440
 6 498
 1n 9
 37* 765
 41* 746
 41* 742
 41* 754
 43* 714
 44* 493

by the governor, and there is no affirmative record that it did not secure the concurrence of both house, the court cannot say the certificates of these officers do not import verity

(Argued February 20, 1888; decided February 21; opinion filed February 4, 1889.)

Original proceeding on *habeas corpus*.

W. E. Dodge, M. W. Greene, Cyrus Wellington, and Ball, Wallin & Smith, for petitioner.

C. F. Templeton, Atty. Gen., C. B. Pratt, and W. A. Selby, for respondent.

No briefs on file.

TRIPP, C. J. The petitioner, Patrick McMahon, was arrested upon complaint before a justice of the peace of Grand Forks county, charging him with selling intoxicating liquors in violation of chapter 70, Laws 1887, known as the "Local Option Law." The petitioner, having been bound over to await the action of the grand jury of that county, and declining to give bail, was committed to the jail of said Grand Forks county, and he sues out of this court a writ of *habeas corpus*, directed to the defendant, O'Connor, as the person having him in custody, alleging that he is unlawfully restrained of his liberty, in that the statute upon which this offense is based is unconstitutional and void, and was never enacted by the legislative assembly of the territory.

No question is raised as to the right and power of the court to determine these questions in this manner, and, as the proceeding is a friendly one, brought as a test case to determine at an early day, and in a speedy manner, the legality of this statute, the court has not seen fit to examine into, and will not pass upon, questions other than those mooted at the argument.

The plaintiff in this proceeding seeks to attack the validity of chapter 70 of the Laws of the Legislative Assembly, passed at the

seventeenth session, 1887, entitled "An act to prohibit the sale of intoxicating liquors by local option." By the provisions of the act the board of county commissioners are required to submit to the qualified voters of any county, at any general election, the question of prohibiting the sale of intoxicating liquors whenever one-third of the voters of said county, as evidenced by the vote cast at the last preceding election, petition said board therefor; and if a majority of the votes cast at such election shall be "against the sale," it shall be unlawful for such board to issue or grant a license for the sale of intoxicating liquors in such county. Section 5 of this act provides: "Sec. 5. In addition to the penalties now prescribed by law, any person or persons who may sell any intoxicating liquors without a license having been duly granted, as provided by law, or where the license is granted in violation of this act, shall be restrained from so doing by proper injunction issued by the court, or a judge thereof; and any person may secure such injunction, and may use the name of the county as plaintiff in the suit, and no security shall be required, and the district attorney of such county shall in all things conduct such prosecution."

The petitioner contends—*First*. That the act is within the prohibition of the constitution of the United States, in that he is deprived of his property without due process of law. *Second*. That the act is in violation of the organic law of the territory and the statutes of the United States, (a) in that it conflicts with the revenue laws of the United States granting licenses to sell intoxicating liquors; (b) in that it conflicts with the section of the Revised Statutes of the United States which prohibits the legislature from enacting any law "impairing the rights of private property;" (c) in that it conflicts with the statute of the United States prohibiting local or special legislation; (d) in that it conflicts with the statute of the United States by delegating the legislative power conferred upon the legislative assembly. *Third*. That the law is inoperative, and cannot be enforced, for the reason that no penalties or punishments are prescribed for its infraction or disobedience. *Fourth*. That the act was never

passed by the legislative assembly, and never became a law of the territory.

We will consider these objections in the order presented.

It was contended at the argument that this statute was within the prohibition of the first section of the fourteenth amendment to the constitution, which provides that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It need only be stated, what has been so often decided, that the first amendments of the constitution were limitations upon the government of the United States, and upon the powers granted by the constitution to the national government. But the fourteenth amendment was intended to be, as its language plainly expresses, a limitation upon the states in their sovereign capacity. This section can therefore be of little aid in determining the powers of the territorial legislature. The territory has no powers, legislative, executive, or judicial, except such as are conferred upon it by act of congress. It can have over a given subject no greater powers than congress itself has, and such powers may be as limited as congress may determine. It has no powers, in fact, except such as are expressly, or by fair implication, conferred by congress itself. The sovereignty of the territory, so called, comes from congress, not the people. If congress have not the power under the constitution, it can confer none upon the territory. As has been aptly stated, the territory is "an outlying province of the national government," subject to its direct control through congressional legislation, or its indirect control through congressional supervision of territorial legislation. That this national sovereignty over the territories exists has never been denied. Upon what particular section of the national constitution such grant of power is based, the decisions of the court are not harmonious, but, whether it comes from the power granted "to make all needful rules and regulations respecting the territory," etc., or from whatever clause of that instrument the power is derived, it is sufficient.

that the power undoubtedly exists; and it must follow that the legislative power of the territory is limited, not only by the powers of congress granted by the constitution, itself, but it must be confined to the powers also expressly or by necessary inference conferred by statute of congress upon the legislative assembly. Governed by this rule, and examining the powers conferred upon congress by the constitution, and the limitation upon such powers prescribed by the earlier amendments, we find nearly the same language contained in the fifth amendment as that relied upon at the argument and contained in the fourteenth amendment, to-wit, that "no person shall be deprived of life, liberty, or property without due process of law." Is this law open to the objection that this defendant is deprived of his liberty "without due process of law?" Without stopping to discuss the phrase "due process of law," upon which so much learning has been expended by the courts, whose reasoning may be read with great interest and profit, it is sufficient here to say that the same clause, in substance, will be found in the bill of rights of every, or nearly every, state of this Union in which the constitutionality of this and similar local option laws has been sustained. To say by this court that this law is in conflict with such provision of the constitution is to say that the decisions of those states which deny the position taken by counsel here are wrong, and should be overruled, and that congress itself has no power to enact such a law; for if congress has attempted to grant to the legislature of Dakota a power it could not grant, or if this limitation prohibits the exercise of such power so granted by congress, it is because it has not such power itself, or, by such limitation, is restrained from the exercise of such power. The power to make laws regulating or prohibiting the sale of intoxicating liquors is undoubtedly within the police powers of the state or nation. Whatever doubt may once have existed, it is now too late to urge that these provisions of limitation in the constitution have reference to or affect the police powers of the state or nation. *Cooley, Const. Lim. 720, authorities cited: Com. v. Kendall, 12 Cush. 414; v. 5 DAK.—26*

Com. v. Clapp, 5 Gray, 97; *Santo v. State*, 2 Iowa, 202; *State v. Wheeler*, 25 Conn. 290; *People v. Hawley*, 3 Mich. 330; *Jones v. People*, 14 Ill. 196; *State v. Prescott*, 27 Vt. 194. It was questioned after the adoption of the fourteenth amendment whether its broad language was not intended to prevent the states from seeking refuge under its police powers to arbitrarily prohibit and restrain the exercise of various trades and employments as matters of municipal concern; and in *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, a case which went up from San Francisco, Cal., it was claimed that under this amendment the municipality had no power to prohibit the complainant from carrying on his business of a public laundry, in a certain portion of the city, between the hours of 10 at night and 6 in the morning, and from employing persons about the premises having infectious or contagious diseases, upon the ground both that the ordinance was a discrimination as between citizens of the same municipality, and that it deprived the petitioner of the right to labor and acquire property. The supreme court, in denying both these propositions, takes occasion to say: "But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." It may then be safely stated that this law is not in conflict with the constitution of the United States, in that congress itself would not have power to pass such a law to be enforced in those places over which it has exclusive powers of legislation, or in that the limitations of the constitution prohibited the exercise of such power.

And the next question for our consideration is, has congress conferred such power of legislation upon the legislative assembly of the territory? The legislative power of the territory is conferred by section 1851, Rev. St. U. S., which provides that

"the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." This grant of power is a broad one. "All rightful subjects of legislation" is a more extensive grant of legislative power than will be found given to legislative bodies in most of the sovereign states. It not only gives to the legislature the right to legislate upon all rightful subjects of legislation, but it gives to the legislature in the first instance the power of determining what are rightful subjects of legislation; and in the exercise of such power the legislature has determined that the prohibition of the sale of intoxicating liquors by local option is a rightful subject of legislation. Is it a rightful subject of legislation? If it is, then the congress conferred upon the legislative assembly such power, unless the exercise of such power is in conflict with the constitution or some statute of the United States. The question of whether it is rightful or not is not to be determined by the expediency or propriety of such legislation, for no two legislatures might agree upon the question of whether such a law was or was not suited and adapted to the needs, habits, or education of the people. The term "rightful" has more the significance of "*lawful*," and the clause must be interpreted to mean that congress grants to the territorial legislative assembly all the powers necessary to be exercised by it in the establishment of a temporary sovereign government. There are certain powers it cannot grant, such as the right to coin money, to regulate commerce, to pass bankrupt laws, etc., for such powers can be exercised by congress alone; but all necessary powers of municipal government must have been and were intended to be granted by the clause. Congress, in the exercise of this power, early created local self-governments out of its "outlying territory," denominated "territorial governments," a name not found in the constitution itself, and it gave to these governments the usual executive, legislative, and judicial powers. The organic acts of the several territories from the earliest history of the country have been of the same general character. They are framed after and founded upon the constitution of the United

States itself, and are singularly like the early state constitutions, and the division into and the separation of the three great departments, and the grants of powers thereto, are much the same in character and distribution. The intention of congress to form a government is in terms expressed in the first section of our organic act, where, after giving the boundaries of the proposed territory, it concludes with the words, "is organized into a temporary government by the name of the 'Territory of Dakota.'" It has sometimes been said that the territory is an "embryo state," and while the congress has never surrendered its right of supervision over the legislation of the territory, yet such power of congress has been very rarely exercised in most of the territories, and never, perhaps, in the history of this territory, except upon direct application of her citizens to supply some omissions, or to relieve from some inadvertence of territorial legislation during the recess of the territorial assembly; so that, in organizing the "temporary government," congress intended such government to have and exercise all the attributes of sovereignty "temporarily," subject only to such supervision as the congress shall choose from time to time to exercise over it. With this residuum of power remaining in congress, dormant, except when expressly exercised, the government of the territory is sovereign in each department, and its organic law is to be construed as its constitution, either in the light of a grant or a limitation of power. Perhaps, as to some portions, it is to have the former, and as to others, it is to have the latter construction. In *Hornbuckle v. Toombs*, 18 Wall. 655, Judge BRADLEY, in speaking of territorial governments, says: "As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of congress to revise, alter, and revoke at its discretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature." And in *Clinton v. Englebrecht*, Chief Justice CHASE, upon

the same subject, says: "The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by congress." 13 Wall. 441.

The legislatures of all the territories, under organic acts almost like our own, have exercised and granted to public corporations to exercise the right of eminent domain, one of the highest prerogatives of sovereignty, and this not only with the silent acquiescence of congress and the people, but by the solemn adjudication of the courts. *Swan v. Williams*, 2 Mich. 427.

It is too late now for the courts to hold that the territory is other than a *temporary sovereign government*,—*temporary*, in that its organic laws and its very existence are subject to the paramount will of congress, its creator; *sovereign*, in that its executive, legislative, and judicial powers are unlimited except by the terms of the constitution or its organic law. When congress created the temporary sovereign government of the territory, it intended to confer upon it such legislative powers as are usually exercised by sovereign states. Police powers are among the more common powers exercised by the sovereign states. Mr. Cooley defines police powers to be: "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation by which the state seeks not only to preserve the public order, and to prevent offenses against the state, but also to establish, for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." Cooley, Const. Lim. 706. Blackstone defines it to be (4 Bl. Comm. 162) "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be

decent, industrious, and inoffensive in their respective stations." Jeremy Bentham has this definition: "Police is in general a system of precaution, either for the prevention of crimes or of calamities. Its business may be distributed into eight different branches: (1) Police for the prevention of offenses; (2) police for the prevention of calamities; (3) police for the prevention of endemic diseases; (4) police of charity; (5) police of interior communications; (6) police of public amusements; (7) police for recent intelligence; (8) police for registration." Bentham's Works, pt. 9, p. 157. Chief Justice SHAW says: "The power we allude to is rather the police power, the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise." Cooley, Const. Lim. 707, 708. Judge REDFIELD says: "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim '*sic utero tuo ut alienum non lædas*,' which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. * * * There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state; of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned." *Thorpe v. Railway Co.*, 27 Vt. 149. The power to prohibit the sale of intoxicating liquors not only comes within these definitions, but it has been frequently so held by the courts. Mr. Cooley says: "In the American con-

stitutional system the power to establish the ordinary regulations of police has been left with the individual states, and it cannot be taken from them, either wholly or in part, and exercised under legislation of congress. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the states. All that the federal authority can do is to see that the states do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the constitution has confided to the nation, or deprive any citizen of rights guarantied by the federal constitution." Cooley, Const. Lim. 708, 709. The very theory upon which our system of government is based, of allowing each locality to govern its municipal affairs in its own way, and that the congress shall legislate upon affairs pertaining to the good of the whole people, made it necessary that the people of the territories should have a local government; and its matters of police were among the first and necessary powers committed to such local government. If, then, the power of local option pertains to the police, it is a rightful subject of legislation, and the power to make such law was given by the organic act; but, irrespective of such logical conclusion, to which we must arrive, it would be a bold and backward step for the court to say, in the face of modern legislation upheld by the highest courts of the states and of the nation, that local option in matters of intoxicating liquors is not a "rightful subject of legislation." Would not the general conclusion be a most just and natural one, that the exercise of such a power, which, in the states under a general grant of power or exercise of power no broader or more general in character than our own, has been almost uniformly sustained by their highest courts, and more recently by the supreme court of the United States, is not in conflict with constitutional powers? Would we not, I repeat, more naturally conclude that congress, with such legislative and such judicial determinations before it, in granting to the territorial legislature the power over all "rightful subjects of legislation," intended it to have the right to exercise all such

powers as were usually exercised by other legislative bodies under similar grants of sovereign power? That congress had the power to grant, and that it did grant, such power to the territorial assembly, we have no doubt; and the legislature has full power to exercise such power unless it is prohibited by some other or later act of congress itself.

It is contended that the act is in conflict with the revenue laws of the United States granting license to sell intoxicating liquors. This question is determined by the license cases found, *eo nomine*, *McGuire v. Com.*, 3 Wall. 387, and *License Tax Cases*, 5 Wall. 462, in which the supreme court holds that these laws are enacted for revenue merely, and that, whether the tax be collected under the form of a tax or license, it is in fact a tax, and not a license or permission to perform the act. In the case last above cited, the court says: "The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law if he pays it. * * * But, as we have already said, these licenses give no authority. They are mere receipts for taxes." But it is contended that the statute of 1864, which in terms provided "that no license provided for in the act should be construed to authorize any business within any state or territory prohibited by the laws thereof," was amended by the Revision of 1878, by leaving out the word "territory," thereby intending to give the construction that in the territories the acts should give a license. Whatever of force there might have been to this argument, an examination of the entire title on revenue, in which this section occurs, reveals the fact that the word "state" is made to include "territory." The first section of chapter 1, tit. "Internal Revenue," Rev. St. U. S., provides that "the word 'state,' when used in this title, shall be construed to include the territories and the District of Columbia where such construction is necessary to carry out these provisions." And an inspection of the entire title shows that the word "state" is used throughout the chapter to include "territory," as in section

3200, where it is provided that the collector may seize lands of a delinquent in "any state," and in section 3211, where the secretary of the treasury is authorized to designate United States depositories in "any state," etc.

The objection is equally untenable that the act "impairs the rights of private property." The act contemplates nothing beyond the prohibition of the sale of intoxicating liquors. It does not seek to confiscate, destroy, or prevent any lawful use of intoxicating liquors, or to lessen the value of such property, or of other property used in or about the sale of such liquors, except in so far as a depreciation in value may result from the prohibition of the sale. Such impairing of the rights of private property must always more or less result from the enforcement of police regulations. The exercise of the police power which establishes fire limits, regulates markets, controls gunpowder and combustible materials, fixes the speed of trains and vehicles, establishes stands for hackney coaches, prohibits cattle from running at large, and otherwise interferes with the use of private property for the public good, in a similar way impairs the rights of private property. "The right of private property" is always subject to the fundamental law that "no man may so use his own property as to injure another." Upon this fundamental principle rests the whole police power of our government, and whether the use of private property in a particular manner does injure another is the test of every police regulation. But this is not a question for the courts where the legislation is honestly and fairly what it purports to be. It is properly an exercise of legislative power; and though the courts might differ materially from the legislature as to the wisdom or the propriety of the legislation, and even whether in fact the exercise of one's right in private property did result in public injury,—whether certain foods were unwholesome; whether certain drinks were deleterious; or whether certain materials and compositions were dangerous,—yet the determination of such questions is for the legislature, and not for the judiciary, and its decision is binding on the courts, except in cases where, un-

der guise of the exercise of police power, the legislature has wrongfully impaired private rights; so that as long as the courts can say the legislative act provides only for the exercise of police power, so long are they bound to uphold the validity of such act, and to say it does not "impair private rights." It was upon this ground the case of *Mugler v. Kansas* was so strongly contested in the supreme court of the United States. 123 U. S. 623, 8 Sup. Ct. Rep. 273. Counsel for *Mugler* contended that the Kansas act, in prohibiting the manufacture of intoxicating liquors, impaired private rights; that a private individual had the right to manufacture beer for his own use; that he was not thereby using his own property to the injury of others. It was conceded by counsel that the state had the power to prohibit the sales of intoxicating liquor, and to prohibit the manufacture for sale, but that it had no right or power to prohibit its entire manufacture; that "the doctrines of the commune give to the state the right to control the tastes, appetites, and habits of the citizens. His dress, food, drink, domestic relations, are controlled and regulated by the state. 'The state is everything, the individual nothing.' In order to make him a useful citizen and tax-payer, the state exercises a surveillance over all that he is and has." That, "on the other hand, our system of government, based upon the individuality and intelligence of the people, does not claim to control the citizen, except as to his conduct to others, leaving him the sole judge as to all that only affects himself." But the court, in answer to this argument, says: "It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in *Munn v. Illinois*, 94 U. S. 113, 124, while power does not exist with the whole peo-

ple to control rights that are purely and exclusively private, government may require 'each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.' But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions so as to bind all must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. * * * If, therefore, a state deems the absolute prohibition of the manufacture and sale within her limits of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department. And so if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question." 123 U. S. 660-662, 8 Sup. Ct. Rep. 296. The doctrine of this case has been again examined in the case of *Powell*

v. *Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, where the legislature of Pennsylvania undertook to punish for the manufacture of oleomargarine. It was offered at the trial to prove by experts that "it was made from pure animal fats; that the article was substantially identical with that produced from milk and cream; and that it was a wholesome and nutritious food." The offer as expressed was made to show that the statute was not a proper exercise of police power, and that it deprived the defendant, under the state constitution, of the lawful use "of his property, liberty, and faculties, and destroys his property without making compensation." The state court denied the offer, and the supreme court of the United States, in affirming the decision of the lower court, says: "Whether the manufacture of oleomargarine, or imitation of butter, of the kind described in the statute, is or may be conducted in such a way or with such skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. * * * If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another

department of government." See, also, *Beer Co. v. Massachusetts*, 97 U. S. 25; *Patterson v. Kentucky*, Id. 501; *U. S. v. De Witt*, 9 Wall. 41.

Courts are reluctant to declare legislative enactments unconstitutional and void. As stated by Chief Justice WARRE, in *Sinking Fund Cases*, 99 U. S. 718: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." See, also, *Fletcher v. Peck*, 6 Cranch, 87, 128; *College v. Woodward*, 4 Wheat. 518, 625; *Livingston v. Darlington*, 101 U. S. 407.

That it is in conflict with the statute of the United States prohibiting special legislation, or that it is a delegation of legislative power, might have been urged with some plausibility in the earlier days of American jurisprudence. It is now too late to argue the question as an original proposition. Matters affecting the police, such as the sale of intoxicating drinks, running at large of cattle, and kindred questions, are so differently regarded in different localities that it has been by no means uncommon to submit them to the people of the locality to be affected by their exercise, and laws so submitting such questions have been almost uniformly sustained, though not always upon the same ground. Many of the authorities in a case like the one before us hold that the law was perfect in all its parts, and complete, so far as any further action of the legislature was concerned, when it was approved by the executive, and that its adoption or rejection by the voters, or, rather, the favorable or unfavorable vote as to execution of the law, was a contingency merely provided for by the legislature as to the time when it should become operative. Mr. Justice AGNEW, in *Locke's Appeal*, 72 Pa. St. 491, thus expresses it: "The law did not spring from the vote, but the vote sprang from the law, and the law alone declared the consequence to flow from the vote. The assumption that the act is not a law till enacted by the people

is the foundation of the argument, and with its fall the superstructure vanishes. The character of this law is precisely that of hundreds of others, which the legislature will make dependent on some future act or fact for its operation. To assert that a law is less a law because it is made to depend on a future event or act is to rob the legislature of the power to act wisely for the public welfare, whenever a law is passed relating to a state of affairs not yet developed, or to things future, and impossible to be fully known." See, also, *State v. Court Common Pleas*, 36 N. J. Law, 72; *Village of Gloversville v. Howell*, 70 N. Y. 286; *Fell v. State*, 42 Md. 71; *Com. v. Weller*, 14 Bush, 218; *State v. Wilcox*, 42 Conn. 364; *Boyd v. Bryant*, 35 Ark. 69; *Com. v. Bennett*, 108 Mass. 27; *Cain v. Commissioners*, 86 N. C. 8; *Bancroft v. Dumas*, 21 Vt. 456; *Smith v. Janesville*, 26 Wis. 291. But the theory of self-government, upon which our whole fabric of government is founded, seems to furnish the proper and natural solution of the question. These laws are local in character. Different localities may be differently affected by such legislation, and from the early history of our colonial governments questions affecting the locality have been left to the decision of the people interested therein. The New England town of to-day is a small republic in everything pertaining to local government, the county is an aggregation of towns, and the state an aggregation of counties with sovereign powers. The town or municipality does not concede that it derived its authority through the munificence of the state in the descent of power, but it claims to have had such power anterior to the state; that the state is the creation of the town, rather than that the town is the creation of the state. Mr. Cooley states the doctrine very clearly when referring to the so-called delegation of legislative power to municipalities: "The legislature, in these cases, is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the state; and when it interferes, as sometimes it must, to restrain and control the local action, there should be reasons of

state policy or dangers of local abuse to warrant the interposition." Cooley, Const. Lim. 229.

It would seem to be conceded that the legislature has power to authorize or allow municipal governments by charter to exercise all the ordinary police powers, including the regulation and prohibition of the sale of intoxicating liquors. If this be so, it is certainly far less a delegation of power to enact for such locality a perfect and complete statute, leaving to its people only the power to fix the date when it shall come into force, than to give to such locality complete control and power over such legislation. The law being conceded to belong to the police powers of the government, and to be local in character, it may with propriety be left to the county to determine when it shall and when it shall not be enforced.

The objection that the statute provides no penalties, and cannot, therefore, be enforced, is answered by examination of the statute which, in terms and by implication, continues the former penalties in force, and provides an additional remedy for the restraint of such sale by injunction. See section 5, *supra*. The language of the section is too plain to admit of doubt. The legislature clearly intended to apply the penalties of the former law to a disobedience of the latter law. The former law is in no manner repealed, in terms or by implication, but was in several sections amended by the same legislature, and continued in full force. Chapters 71, 72, etc., Laws 1887. By reference to the penalties prescribed by a former statute, and by providing others "in addition thereto," the statute must be construed as including and as having incorporated into it the penalties of the statute referred to. *Turney v. Wilton*, 36 Ill. 385; *State v. Wilcox*, 19 Amer. Rep. 536.

The last point raised by counsel, to-wit, that the law never passed the two branches of the legislature in the manner prescribed by law, and which was ably and ingeniously presented, can receive but a passing notice here. How far, under our law, a court has power to go behind the statute, as it appears to be approved by the executive, and examine the journals and other

records to determine the regularity and validity of its enactment, we are not required here to determine; for, while from the arguments of counsel there appear to be irregularities in the bill and mistakes in reference to the bill, in the various stages of progress through the two houses, and on its way to the executive, exhibiting to the court an almost inexcusable haste and want of care in the consideration of so important a measure, yet we are clearly of the opinion that no such omission was made or error committed as would render invalid the act in question, if we were to go behind the act as approved to consider its effect. The certificate of the presiding officer of each house shows the act to have been regularly passed by that body. The journals are in many cases silent as to the action of the house when they should have spoken. The act was in proper time approved by the governor, and it is sufficient for this case to say it will not declare the law invalid by reason of the mere failure of the journals to record its passage, and, in the absence of any affirmative record that it did not secure the concurrence of both houses, we cannot say the certificates of the sworn officers of the two bodies of the legislative department do not upon their face import verity. The writ is discharged, and the defendant is remanded to the officer having him in charge. All the justices concurring, except Justice THOMAS, not voting.

CHAMPION, Appellant, v. BOARD OF COUNTY COMMISSIONERS OF
MINNEHAHA COUNTY, Respondent.

1. *Certiorari*—Writ—Sufficiency.

Upon the affidavit of C. the district court, in the name of the territory, issued a writ of *certiorari* to a board of county commissioners to review their action in submitting to the voters of the county, under the "local option law," the question of prohibiting the sale of intoxicating liquors upon a petition alleged to contain the names of a less number of voters than required by the law. The writ charging the facts contained in the affidavit alleged that the said board, without a petition having been presented to them, signed by at least one-third of the legal

voters of the county as shown by the last preceding general election, ordered an election to be held on the question of prohibiting the sale of intoxicating liquors in said county; that the said C. is beneficially interested in the result of said election, he being in the retail liquor business in a city of said county, and having property in said business that would be greatly deteriorated in value if said election was regular and proper; that he had applied to said city for a license to carry on said business, and had been refused the same because of the said election, and for no other reason. After return, and without a hearing on the merits, *held*, the court erred in quashing the writ on any of the following grounds.

1. It does not appear the board has exceeded its jurisdiction.
2. The writ fails to show on its face any case in which it ought to issue.
3. The writ is informal, defective, and insufficient.
4. Because the powers of the board in regard to the matters therein referred to had ceased.
5. The writ is not properly entitled.
6. It does not show C. a party beneficially interested, so as to entitle him to institute this proceeding.
7. There is a remedy by appeal.
8. The action complained of was ministerial.

2. Same—Appeal—Review—Discretion.

Although this writ is discretionary, still, its dismissal appearing not to be based upon discretion, the appellate court will examine the grounds thereof, and, if found insufficient, will reverse and remand for action on the merits, and an exercise of discretion.

3. Same—Party Beneficially Interested

The action complained of may be common in character, but, if it be special in amount or degree, the complainant is beneficially interested within the meaning of the law.

4. Same—Appeal.

Although this writ under section 685, C. C. Pro., cannot issue where there is a writ of error or appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy, and by section 46, c. 21, Pol. C., an appeal is given to any person aggrieved "from all decisions of the board of county commissioners," still the matter before the board in this case was such that jurisdiction could not have been conferred upon the district court to have heard it originally, and it could not take it by appeal. *Certiorari* was the only remedy.

(Argued February 20, 1888; reversed February 24; opinion filed February 18, 1889.)

Appeal from district court of Minnehaha county; Hon. C. S. PALMER, Judge.

V.5DAK.—27

Winsor & Kittredge, for appellant.

By chapter 70, Laws 1887, § 1, the board of county commissioners are only authorized to act in case of certain events, viz. : (1) That a petition shall be presented to them ; (2) it shall be signed by at least one-third of the legal voters of the county ; and (3) that the only evidence that the county commissioners can regard, or look at, in measuring the qualifications of these voters, is the list of those who voted at the last preceding general election. *Loomis v. Bailey*, 45 Iowa, 403; *Herrick v. Carpenter*, 6 N. W. Rep. 574; *Bennett v. Hetharington*, 41 Iowa, 142.

Our statute upon the subject of *certiorari* is a copy of that of California. *Keys v. Board of Supervisors*, 42 Cal. 252, decides several things that are brought up in this case. We call attention particularly to two facts there decided. They hold that the proceedings of a board of supervisors in laying out a highway involved the exercise of judicial functions sufficiently to review by a writ of *certiorari*. The courts of New York, Wisconsin, Michigan, and others have decided over and over again that the proceedings of a board of supervisors, whenever they exercised judicial functions in any way, are reviewable by this writ. Our statute makes them so. This case also decided that they would consider the length of time in which an appeal could be taken from the district to the supreme court in passing upon the time between the action of the board and the issuing of the writ.

It is said we had a right of appeal from the action of the board. A special statute conferring special powers for a special purpose cannot become so incorporated into the general act prescribing the powers and duties of the board that a right of appeal can exist under the general act. *Bosley v. Ackelmire*, 39 Ind. 536; *Commissioners of Scott County v. Smith*, 40 Ind. 61; *Moffit v. The State*, Id. 217; *Commissioners v. Markle*, 46 Ind. 96.

The writ must be granted on the application of a party beneficially interested. This is the same language as is used in the statute in reference to *mandamus*. The supreme court of California, in *Linden v. Board of Supervisors of Alameda County*,

45 Cal. 6, says that "this necessarily means that in application made by a private party his interest must be of a nature which is distinguishable from that of the mass of the community." We have brought ourselves within that rule. The petitioner, as is shown, was during the year 1887 a licensed retail liquor dealer, and had a large amount of property engaged in said business. By the action of the board it has cut him off from further pursuing his business. He can no longer obtain a license. His property is greatly depreciated in value, and he has become liable to the penalties of the law. See *Maxwell v. Supervisors*, 53 Cal. 389.

The duty of the court was to review the action of this board, —not simply to look at their resolution, but to carefully review the names upon the petitions, and the names upon the poll-list, and from that see whether the board had acted with or without jurisdiction in ordering the election. *Stone v. Miller*, 14 N. W. Rep. 782; *State v. Nemaha County*, 10 Neb. 82, 4 N. W. Rep. 373.

A. A. Polk and H. H. Keith, for respondent.

An order quashing a writ of *certiorari* is discretionary, and will not be reviewed on appeal. *People v. Court of Common Pleas*, 28 How. Pr. 477; *People v. Stilwell*, 19 N. Y. 531; *People v. Hill*, 53 N. Y. 547; *People v. Ferris*, 76 N. Y. 326; *People v. Fire Commissioners*, Id. 605; *People v. Board of Tax Commissioners*, 85 N. Y. 650; *People v. McCarthy*, 102 N. Y. 630, 8 N. E. Rep. 85.

It is a well-established rule, and needs no citation of authorities, that an appellate court will not review discretionary orders.

The allowance of the writ rests in the sound discretion of the court, and it has often been denied when the power to issue it was unquestionable, and when there was apparent error in the proceedings to be reviewed. The court will always be guided by considerations of the public detriment or convenience in using its discretion. *People v. Supervisors*, 15 Wend. 198; *People v. Mayor, etc., of N. Y.*, 2 Hill, 9; *Matter of Mount Morris*

Square, Id. 28; *Inhabitants of Rutland v. County Commissioners*, 20 Pick. 71; *State v. Lowery*, (N. J.) 8 Atl. Rep. 513; *Trustees, etc., v. School Directors*, 88 Ill. 100; *Keys v. Marin County*, 42 Cal. 265; *Spring Valley v. Bryant*, 52 Cal. 140; *Rockingham v. Westminister*, 24 Vt. 288; *Crosby v. Probate Court*, 5 Pac. Rep. 552.

A writ of *certiorari* may be set aside or quashed by the court after the return, or at any stage of the proceedings. *S. & W. R. R. Co. v. Trustees, etc.*, 5 How. Pr. 378; *Ball v. Warren*, 16 How. Pr. 379; *People v. Common Council of Utica*, 45 How. Pr. 289; *People v. Stilwell*, 19 N. Y. 531-533; *State v. Lowery*, 49 N. J. Law, 391, 8 Atl. Rep. 518; *People v. City of Kingston*, 101 N. Y. 82, 4 N. E. Rep. 348.

As a rule, courts will not review the official action of public officers at the suit of a private individual who has no peculiar interest therein, nor will they be allowed to sue out a writ of *certiorari* for that purpose. *Holden v. Village Council*, 34 N. W. Rep. (Minn.) 336; *Iowa News Co. v. Harris*, 17 N. W. Rep. (Iowa,) 745; *Conkling v. County Commissioners*, 13 Minn. 454, (Gil. 423;) *Miller v. Town of Palermo*, 12 Kan. 14; *McMillan v. Butler*, 15 Kan. 65; *State v. County Clerk*, 59 Wis. 15, 16 N. W. Rep. 617; *Bates v. Plymouth*, 14 Gray, 163; *Heffner v. Com.*, 28 Pa. St. 108; *Bobbett v. State*, 10 Kan. 9; *Craft v. Jackson County*, 5 Kan. 313.

The appellant is guilty of laches, and is estopped from questioning the regularity or jurisdiction of the board of county commissioners in making the order complained of. *Ellis v. Karl*, 7 Neb. 381; *Hager v. Supervisors*, 47 Cal. 228, 229.

A writ of *certiorari* ought not to be granted, even if the record of the inferior tribunal, when returned, would appear to be defective or informal, where, if the proceedings of the board are quashed, the parties cannot be placed in *statu quo*. *Rutland v. County Commissioners*, 20 Pick. 71; *Hager v. Supervisors*, 47 Cal. 222.

The powers and functions of the board to which said writ was directed, in regard to the matter therein referred to, had ceased, and a *certiorari* will not lie to an inferior tribunal except to re-

move proceedings which remain before it. *People v. Commissioners*, 30 N. Y. 72; *People v. Commissioners*, 43 Barb. 494; *Corwin v. Walter*, 68 N. Y. 408; *People v. Supervisors*, 1 Hill, 195.

Our statute provides that this writ may issue only when there is no writ of error or appeal, or any other plain, speedy, and adequate remedy. There was a right of appeal. Section 46, c. 21, Pol. C. See, also, subdivision 6, § 29, same chapter; *Adams v. Wood*, 8 Cal. 316; *Robinson v. Currey*, 7 Q. B. Div. 475.

Our statute as to appeal is substantially like that of Indiana. See, on this subject, *Grusenmeyer v. City of Logansport*, 76 Ind. 550; *R. R. Co. v. Board of Commissioners*, 78 Ind. 213; *Hanna v. Board*, 29 Ind. 170; *Hauk v. Barthold*, 73 Ind. 25; *State v. Board of Commissioners*, 45 Ind. 508; *Fordyce v. Board of Montgomery Co.*, 28 Ind. 454; *Ellis v. Karl*, 7 Neb. 386; *Clark v. Dayton*, 6 Neb. 192.

These general appeal statutes and chapter 70 should be read and construed together.

The case of *Grusenmeyer v. City of Logansport*, 76 Ind., *supra*, overruled the cases of *Bosley v. Ackelmire*, 39 Ind. 536, and *Board of County Commissioners v. Smith*, 48 Ind. 61, cited in appellant's brief. The case of *Bosley v. Ackelmire* is founded upon the authority of *Allen v. Hostetter*, 19 Ind. 15, and that is founded upon the authority of *French v. Lighty*, 9 Ind. 475; and the court in *Hanna v. Board*, *supra*, criticises these decisions, and says that they are not supported by *French v. Lighty*.

If Champion did not have such an interest as would have given him the right to an appeal under the provisions of the statute above cited, then certainly he cannot maintain these proceedings, for it is well established that a person not a party to the proceedings, and not aggrieved by the decision, cannot have the same reviewed by *certiorari*. *Colden v. Botts*, 12 Wend. 234; *Hughes v. Stickney*, 13 Wend. 280; *People v. Overseer of Poor*, 44 Barb. 167; *Starkweather v. Seeley*, 45 Barb. 164; *People v. Andrews*, 53 N. Y. 445; *People v. Chapin*, 2 Cent. Rep. 467.

Section 46, c. 21, Pol. C., also provides another method of appeal from the board of county commissioners: "Any district attorney, upon the written demand of at least seven tax-payers of the county, shall take an appeal from any action of the board of county commissioners * * * when said action relates to the interests or affairs of the county at large, or any portion thereof, in the name of the county," etc.

In California no appeal from the board of supervisors is provided for by statute, and *certiorari* is the only way in which their proceedings can be reviewed.

The writ can never be substituted for an appeal when the time for taking an appeal has been suffered to elapse. *Faut v. Mason*, 47 Cal. 7; *Reynolds v. Supreme Court*, 64 Cal. 372; *Bennett v. Wallace*, 43 Cal. 25; *Miliken v. Huber*, 21 Cal. 166; *S. & W. R. R. Co. v. McCoy*, 5 How. Pr. 378.

The writ of *certiorari* issues only to review the proceedings of tribunals exercising judicial functions, and cannot be granted to review the ministerial acts of any board or officer. *Spring Val. W. W. v. Bryant*, 52 Cal. 132; *Holden v. Village Council*, 34 N.W. Rep. 336; *People v. Mayor*, 2 Hill, *supra*; *Matter of Mount Morris Square*, Id. 14; *People v. Supervisors*, 43 Barb. 232; *People v. Walter*, 68 N. Y. 403-410; *State v. Third District Court*, 5 Pac. Rep. 64; *Weisman v. Kemen*, 61 Wis. 494, 21 N. W. Rep. 530; *Galligan v. Metacomet Mfg. Co.*, 3 New Eng. Rep. 705.

The supreme court of this territory in the case of *Spencer v. County of Sully*, 33 N. W. Rep. 97, held that boards of county commissioners possess no judicial powers whatever.

The Iowa cases relied upon by the appellant arose under a statute concerning the relocation of county-seats, and which makes the acts of the board of supervisors judicial, by requiring them to determine by proof as to the genuineness of the signatures to the petition, etc.

TRIPP, C. J. This is a special proceeding by *certiorari*, wherein the plaintiff obtained from the district court of Minnehaha county a writ against the board of county commissioners

of that county, and the county clerk thereof, to certify up the records and proceedings of said board, wherein it decided to call an election under the "local option law" of 1887. The affidavit of the plaintiff upon which the writ issued is very full, and is set out *verbatim* in the record. The writ recites the allegations of fact relied upon as evidenced by the affidavit, and is as follows: "Whereas, it has appeared to us by the affidavit of B. B. Champion that lately, before you, or a majority of you composing at the time the board of commissioners of the county of Minnehaha, such proceedings have been had that you, or a majority, have irregularly, and without authority or jurisdiction in the premises, and without a petition having been presented to you, signed by at least one-third of the legal voters of the said county of Minnehaha, as shown by the last preceding general election, praying that the question of prohibition of the sale of intoxicating liquors be submitted to a vote of said county, and that you did order an election to be held on the 8th day of November, 1887, on said question; and whereas, B. B. Champion is shown by said affidavit to be a person beneficially interested in the result of said election, he being a person engaged in the retail liquor business in the city of Sioux Falls, in said county, and having property which will be greatly deteriorated in value if said election, so called by you, was regular and proper, and he, the said Champion, having deposited his money for a license to sell intoxicating liquors for the six months ending July 1st, in the year 1888, and having requested such license, and tendered a proper bond to the city council of the city of Sioux Falls, which license has been refused because the result of said election in the minds of the city council of Sioux Falls is doubtful, and for that reason alone, and having been restrained by an injunction from this court from selling intoxicating liquors; and whereas, it is alleged by said B. B. Champion that your proceedings therein have been irregular, without authority, and in violation of section 1 of chapter 70 of the Laws of Dakota passed at the seventeenth session of the legislature of said territory; and that, being willing that your proceedings in the premises and appertaining thereto

should be certified and returned by you into our district court on the 14th day of January, 1888, at the court-house in the city of Sioux Falls, do command you," etc.

To this writ the commissioners made return, alleging, in substance, that a petition was presented to the board, a copy of which is made a part of their return, containing more than one-third of the legal voters of Minnehaha county, upon which an order was made calling an election as prayed for, and making a copy of the resolution and order of the board a part of their return. The board further returned that the list of the legal voters, as shown by the last preceding general election, upon which their action was based, was not in the custody of the board; whereupon the county clerk, N. E. Phillips, was made a party to the proceeding by leave of the court, and returned such list of voters as prayed for. The defendants thereupon, appearing specially, moved to dismiss the proceedings, and to quash the writ, upon the grounds which will be noticed hereafter; and the court thereupon, after reciting the issuance of the writ, the return thereof, the motion of defendants, and argument of counsel, etc., ordered "that the writ of *certiorari* heretofore granted in this matter on the application of B. B. Champion be, and the same is, set aside, dismissed, and vacated." From this order vacating the writ the plaintiff appeals, assigning as error that the court erred in dismissing the writ without a hearing upon its merits.

Sixteen reasons were assigned by the defendants why the writ should be dismissed. The prayer of the motion was granted. The order granting the motion does not specify upon which ground or grounds it was granted. From the recitation contained in, and from the words of, the order it was based upon some ground contained in the motion. It is therefore sufficient, if any ground upon which the motion was based will sustain the order. If it will not, the order must be reversed. It is not enough that a good ground could have been alleged upon which the order could have been sustained. Appellate courts hear causes and determine them upon the record made in the court

below whenever jurisdiction of the person and subject-matter are shown to exist; and the question here is, ought the court to have entertained the writ as against the reasons urged by the defendants to quash it? This can only be determined by examination of the reasons alleged *seriatim*:

"*First.* It does not appear that the said board of county commissioners have exceeded their power of jurisdiction, nor do the matters stated in the affidavit for the writ have any tendency to establish such a fact."

That the board did not exceed their jurisdiction is the very question the court was asked to try. It could not determine such a question by dismissing the writ. The writ alone gave the court authority to determine the jurisdiction of the board. When it dismissed the writ, it dismissed with it the jurisdiction to determine the question before it. The statement of the proposition is axiomatic, and contains its own argument.

"*Second.* That the affidavit and writ wholly fail to show on their face any case in which such writ ought to issue."

That the writ failed to show on its face any cause for its issue could no doubt have been raised in this way; but the proper manner would have been to point out to the other side in what way it failed to make a case. Courts are in the habit of dismissing such motions as containing the *very fault* alleged against the other side. Such motions are in the nature of pleas in abatement, and are presumed to give to the other side the material for a better writ. To say "that the affidavit and writ wholly fail to show on their face any case in which such writ ought to issue," conveys to the court and to opposite counsel reasons but little more definite than that the writ ought to be set aside because it ought to be set aside; and an assignment of grounds to vacate a process of court containing no other specification ought to be disregarded. As no point, however, has been made by counsel as to this assignment, we will pass it now; and, if any reason of counsel for affirming the order appealed from can be referred to this ground, we will consider it subsequently.

"*Third.* The writ is, in other respects, informal, defective, and insufficient."

This is but a repetition of the second reason, without the merit even of cumulation.

"*Fourth.* The writ is not issued or directed to the proper tribunal, board, officer, or person having custody of the record, or proceedings to be certified."

No point seems to have been made upon this ground. It was issued, first, to the board; and, second, to both board and clerk, and both made return of all the records upon which the decision was based.

"*Fifth.* That the powers and functions of the board, to whom such writ is directed, in regard to the matters therein referred to, have ceased."

It is difficult to know just what was meant by the allegation that "the powers and functions of the board have ceased."

The powers and duties of the board never cease so long as there is a board. The members may change, the individuality of the board may change, but the board remains the same. If it is meant that the control of the board over this very particular subject-matter has ceased, the same is true of every executive and administrative body when it has performed an executive or administrative duty; and even of the judgment of courts, after the term at which the judgment was rendered has elapsed. Every executive and administrative act is final after the formalities by which it is performed are complied with. Yet courts have power to affirm, modify, or reverse such acts, and they affirm, modify, or reverse even the judgments of inferior courts over which the original tribunal has long lost control. Our statute of *certiorari* fully contemplates this, as provided by section 692, Code Civil Proc.: "If a return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming, or annulling, or modifying the proceedings below." When such

judgment is remitted to the tribunal whose action is reviewed, the judgment of the court merely stands in place of the original decision, and subsequent proceedings had thereon will be governed accordingly.

"Sixth. That said writ is not entitled or properly directed."

The writ, in so far as it is set out in the abstract, runs in the name of the territory of Dakota, as required by section 8, Code Civil Proc., and is directed to the board of county commissioners. No point being made upon this by counsel at the argument, we give it no further notice.

"Seventh. Neither the affidavit nor writ state any facts tending to show that B. B. Champion is a party beneficially interested, so as to entitle him to institute said *certiorari* proceedings, or that he has sustained any injury by reason of the alleged acts of the said board of county commissioners."

If this objection is well taken, the writ should have been quashed. The affidavit was very full which was presented to the judge, and upon which the writ issued; and the writ, to which alone, perhaps, we can look in this application, recites that he was a retail liquor dealer, and engaged in the business at the time complained of; that he had a large amount of property which would become greatly deteriorated in value did such election result in prohibiting the sale of intoxicating liquors; that the city council had refused him license upon the sole ground that at such election the vote was against the sale of intoxicating liquor.

It is true that the private person who invokes the writ against a public officer or tribunal must show some injury to himself not common to all other persons. If the injury resulting is one affecting the public, the public alone should complain. On the other hand, if the injury be a private one, or one peculiar to himself, he alone has the right to be heard. The test is not whether a large number of persons have been injured by some act, or injured in a similar manner, but, is the injury to the complainant peculiar to himself? Can it be said, because the law

affects all liquor dealers by a deterioration of their property, that the man who loses thousands of dollars in depreciation in the value of his buildings and appurtenances and of his stock in trade suffers in common with one who loses a few hundred dollars upon buildings, fixtures, and stock, separate and distinct in ownership, character, and management? The injury may be common in character, but, if it be special in amount or degree, the complainant is beneficially interested. The decisions in which the contrary doctrine is announced are generally where some public or political right is involved, in which there is no valued loss, the political right of one man being equal to that of another, whatever his standing in life. We think the true rule is announced in *Maxwell v. Board*, 53 Cal. 389: "When, however, a public board or officer has exceeded the limited powers conferred by law, and the direct consequence of such excessive use of authority must be to add to the burden of local taxation, it clearly appears that, unless the act *ultra vires* be annulled, each tax-payer must suffer injury, common in character, but special in amount or degree."

"*Eighth.* That the party upon whose application the writ was issued is not beneficially interested."

This is a restatement of the seventh assignment.

"*Ninth.* That the order made by the board of county commissioners, as stated in said affidavit upon which the writ was issued, could be appealed from, and that provision is made by law for appeal from such orders, and there was otherwise a plain, speedy, and adequate remedy."

Our statute provides that the writ may issue "when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction, and there is no writ of error or appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy." Section 685, Code Civil Proc. And if, as urged by defendants, there was an appeal, or other speedy and adequate remedy, the court was authorized to dismiss this proceeding. The defendants rely upon the provision of our statute which al-

lows "an appeal from all decisions of the board of county commissioners upon matters properly before them." Section 46, c. 21, Pol. Code.

The language is broad enough to cover every decision made by the board, of whatsoever kind or character. If the language is to receive a literal construction, the district court would become an asylum for all matters occurring at the meetings of the board. Some person would always conceive himself aggrieved, and, as the cause is to be tried *de novo*, the district court would be converted into a board of county commissioners to determine matters administrative and political as well as judicial. Clearly no such construction can be given to the appeal allowed by statute. Judicial power, and all the judicial power of the territory, is expressly conferred upon the courts, to-wit, the supreme and district courts, courts of probate, and justices of the peace. The legislature can create no other court; and can confer judicial power, *strictly such*,—that which "deprives of life, liberty, or property,"—upon no other tribunal. *Quasi* judicial powers involving judgment and discretion are often, and must necessarily be, exercised by administrative and executive bodies and officers. A *judicial power*, as such, can be exercised only by the courts. The three great departments of the government are intended to be, and must be, separate and distinct. The legislature has no power to confer a strictly executive and administrative or legislative power upon the judiciary, and whenever it has sought to do so the courts have declared it void. As early as 1792 congress undertook to confer upon the courts the power to determine what soldiers should be placed upon the pension list, but the supreme court declared the act unconstitutional and void, in that the determination of who were and who were not entitled to pensions belonged to the administrative or executive department of the government. *Marbury v. Madison*, 1 Cranch, 171. See, also, *U. S. v. Ferreira*, 18 How. 40.

This subject received a careful consideration by this court in *Water-Works Co. v. Hughes Co.*, 37 N. W. Rep. 733, citing with approval the Kansas case (*Fulkerson v. Stevens*) reported

in 1 Pac. Rep. 262, in which that court refused to review on appeal the action of the board of county commissioners in setting off and organizing a new township under the political powers conferred upon them by statute. Upon the same reasoning this court held in *Spencer v. Sully Co.*, 33 N. W. Rep. 97, (February term, 1887,) that the legislature had not and could not confer upon the board of county commissioners judicial powers. At first thought, it might seem paradoxical that appeals lie from *judicial decisions* only of the board to the courts, and that the boards are vested with no *judicial power*. The explanation is found in the fact that while the decisions of the board have no binding force in matters of a strictly judicial character, yet such board is permitted to audit, and to that extent determine, matters affecting persons and property; and an appeal from such decisions is determined as an original action in the district court, in the same manner as if commenced there by service of summons. *Spencer v. Sully Co.*, *supra*.

The courts hold, and must continue to hold, that they cannot and will not exercise other than judicial power.

Was the power exercised by the board of county commissioners judicial? Was it the exercise of such *quasi* judicial power as will sustain an appeal? All decisions of the board arrived at by the exercise of judgment and discretion are, in a measure, *quasi* judicial; but the test is, do they in a legal sense tend to "deprive of life, liberty, or property?" If so, it can only be done by "due process of law." Const. U. S. amend. 5.

These laws belong exclusively to the police power, to the legislative and administrative department of the government. They affect the health, morals, and good order of society. Their propriety or impropriety, their manner of enactment, and their enforcement belong to the courts only when, thereby, the liberty or the property of the citizen is involved. The irregular attempt to adopt or put in operation such a law cannot affect the liberty of the citizen. They are laws in aid of liberty, and not against it. No one is at liberty to do wrong, and, while such laws may curtail indulgences, they are held not to deprive of liberty; nor

under the recent decisions of the supreme court of the United States, to which we must bow with respect, do they violate rights of property. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257. And see *Territory v. O'Connor*, *ante*, p. 397, 37 N. W. Rep. 765, (February term of this court, 1888.) It was there a matter affecting a mere police regulation, not involving the liberty or property of the citizen, and the jurisdiction could not have been originally conferred upon the court, and it could not take it by appeal. The decision was one final with the board, and could be reviewed only by *certiorari*.

"*Tenth.* That the action of said board complained of, and sought to be reviewed by the writ of *certiorari* herein, was ministerial."

This is contradictory of, and contrary to, the position urged in the ninth assignment, already noticed. That the act of the board was of that administrative and executive character that it involved judgment and discretion is too plain for argument, and it follows it was therefore not ministerial.

"*Eleventh.* That the return of N. E. Phillips, register of deeds, and the matters certified and returned by him, are in no way connected with the board of county commissioners, or the record of their proceedings in this matter."

"*Twelfth.* That N. E. Phillips was improperly made a party to these proceedings by amendment; and what purports to be a return made by him is entirely foreign to the matters contained in the record of the board of county commissioners, or with any matters connected with the action of said board in regard to acts complained of by the said B. B. Champion, and sought to be reviewed by the writ of *certiorari* herein."

No time was expended by counsel upon these assignments; and whether or not Phillips was a proper party would not affect the main question involved. If he was not a proper party, the writ should have been dismissed as to him, and left to stand as to the other defendants.

"*Thirteenth.* That the said B. B. Champion has waived his

right to institute *certiorari* proceedings in this matter, if he ever had any."

No point was made upon this objection. There is no evidence of waiver in the record, whatever might have been urged on the ground of laches, had that point been raised; but this, however, would go to the question of discretion only of the court in granting the writ.

"*Fourteenth.* That no proper service of the writ has been made."

"*Fifteenth.* That said writ requires the board of county commissioners to certify and return facts, proceedings, and papers which it is not within their power to do."

These objections go only to requirements which have been fully answered when the board made return to the writ.

"*Sixteenth.* Upon all the grounds appearing upon the face of the writ and the affidavit upon which it is granted."

This is a mere sum total of that contained in the other assignments, and presents nothing new.

We have thus passed over all the objections urged to the issuance of the writ, and as grounds for its discharge; none of which are tenable. A large part of respondents' argument has been expended in attempting to convince this court that the writ is discretionary, and that it was within the discretion of the court to dismiss it after issue,—a proposition well founded in the decisions of the courts; but that was not the ground upon which the decision of the lower court was based, nor was that the decision of which appellant complained. He alleged, as he had a right to do, that none of the reasons assigned in the motion for dismissal of his writ were tenable, and that the court erred in sustaining the defendant's motion, and with him this court must agree.

The case of *Tilton v. Beecher*, 59 N. Y. 176, is directly in point upon this question. Beecher demanded a bill of particulars of the allegations contained in the complaint, in an action of tort. It was contended in the court below that the court had no power to grant the application in such an action, and the

court denied the defendant's motion upon that ground. In the court above, the appellee contended, as here, that the application was addressed to the discretion of the lower court, and was not reviewable. The court of appeals, however, reversed the case, and sent it back for the court to hear the application upon its merits, and to exercise its discretion; holding that the appellate court would examine only the questions raised in the court below.

The principle is by no means a new one. Appellate courts do not try cases. This court has no original jurisdiction in such a case. It sits to review errors committed in the trial of the cause in the lower court. It would not do to allow counsel to assign reasons for the decision of a court where the court itself has assigned other and different reasons. It will not answer for counsel to urge that the order was a discretionary one with the court, when the record clearly shows that the discretionary powers of the court have never been invoked. This court cannot, in advance, determine what decision the lower court in its discretion might render. The cause must be remanded for the action of the court upon the merits of the application, and for exercise of its discretion in the premises. All the justices concur.

MINNEHAHA COUNTY, Respondent, v. CHAMPION, Appellant.

1. Constitutional Law—Legislative Power—Intoxicating Liquors—Local Option.

Territory v. O'Connor, ante, 397, with reference to the validity of the "Local Option Law," followed.

2. Same—Statutes—Construction—Operation.

Chapter 70, Laws 1887, known as the "Local Option Law," is operative in any city of a county adopting its provisions, notwithstanding such city by its charter had the exclusive power to license and regulate the sale of intoxicating liquors, and such power is recognized, and not permitted to be interfered with by chapter 72, Laws of the same session, this chapter, however, being enacted prior to the "Local Option Law,"
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and consisting in an amendment merely to chapter 26, Laws 1879, the general statute authorizing boards of county commissioners to collect licenses for the sale of intoxicating liquors.

(Argued February 21, 1888; affirmed February 21; opinion filed February 19, 1889.)

Appeal from district court of Minnehaha county; Hon. C. S. PALMER, Judge.

Winsor & Kittredge, for appellant.

The local option law is unconstitutional. *Cooley*, Const. Lim. 189; *Barto v. Himrod*, 8 N. Y. 483; *State v. Weir*, 38 Iowa, 143; *Ex parte Wall*, 48 Cal. 279; *Willis v. Owen*, 43 Tex. 41; *Farnsworth v. Lisbon*, 62 Me. 451; *Auditor v. Holland*, 14 Bush, 147.

In 1871 it was decided in the state of Iowa that such local option statute was unconstitutional. *State v. Weir*, *supra*, citing *Santo v. The State*, 2 Iowa, 203; *Geebrick v. The State*, 5 Iowa, 492. See, also, *Lammert v. Lindwell*, 62 Mo. 183; *State v. Field*, 17 Mo. 529; *Rice v. Foster*, 4 Harr. 479.

There are decisions holding the other way, but a distinction can be made between them and the cases that we have cited. They only to a very limited extent sustain such statutes. We find that they are almost invariably an overruling or modification of earlier well-considered cases which have given the law largely to this country, and become leading cases. They are quite exceptional. *Fell v. State*, 42 Md. 71; *Locke's Appeal*, 72 Pa. St. 491.

Section 1846, Rev. St. U. S., vests the legislative power in the governor and legislative assembly. Section 1 of an act of congress approved July 30, 1886, provides that the legislatures of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Regulating county and township affairs. Chapter 70 is in violation of this statute. *Maisze v. The State*, 4 Ind. 342; *Meshmeir v. The*

State, 11 Ind. 482; *Parker v. The Commonwealth*, 6 Barr. 507; *State v. Parker*, 26 Vt. 357.

Chapters 70 and 72 of the Session Laws of 1887, being both passed at the same session of the legislature, and both in reference to the same subject-matter, must be construed together, if possible, and effect given to each. Sedg. St. & Const. Law, 209; *People v. Jackson*, 30 Cal. 427; *Cain v. State*, 20 Tex. 355.

Chapter 72, § 1, and chapter 70, § 3, appear to be in conflict, and, unless they can be reconciled so that effect can be given to each, one or the other of them must fall. It is a well-settled rule that where statutes apparently conflict it is the province to reconcile them, if possible, and thus give effect to the entire legislative expression. Can this be done with these two statutes? It seems to us that it can be done, and that effect can be given to both. The statute would then read: "Should a majority of the ballots cast at such election be against the sale, it shall be unlawful for the board of county commissioners of such county to issue or grant a license for the sale of intoxicating liquors in such county; or of any common council or officer of any incorporated town, city, or village in said county to grant or issue any license for the sale of intoxicating liquors, unless said city has a special charter giving it the exclusive authority in the matter of granting licenses for such sales." It seems to us that this is a reasonable interpretation of these two statutes. In the first place, the city of Sioux Falls, or any city having a special charter giving it exclusive power to grant licenses, is taken apart in this matter and all other matters in which *exclusive* power is given to it from the remainder of the county.

The voters of the county at large could say nothing in regard to who shall be the city officers, as to what the city taxes shall be, as to what ordinances or by-laws it may pass, or as to what licenses it may grant. It was not intended by the legislature that the people of the county should control any of its municipal affairs. Now, in the face of these two laws passed at the same session, will this court say that in this one matter, although in all other things appertaining to this municipal gov-

ernment it is recognized as being distinct and apart from the remainder of the county, although in all its other affairs the county, by its voters, can in no way disturb or regulate it, still in this one matter every voter within that city may have expressed himself the other way; that the ones living in the county outside of it, paying none of its taxes, regulating none of its affairs, having no voice in the administration of its peculiar matters, may step in and say: "*We shall attend to this. We ought not to have any voice in it, but we will regulate your matters. We will cut off from your income what you may desire for the purpose of fixing your streets; of paying your officers, which you have to pay alone; of making your municipal improvements, in which we have to pay not one dollar. We will step in and abrogate this, and thus make taxation heavier upon your citizens, reduce their revenue, and take from you that power, that authority, that right, which your special charter had given you.*"

Section 6 of this same law further interprets it, and, it seems to us, gives the same construction that we do. Why does not this law say that in addition to the commissioners revoking the licenses, that the city council, where they had granted license, should also revoke? The power to revoke implies the power to grant. Let us see where this would bring us. Supposing the city council of a city having a special charter, with the exclusive power to grant licenses, had in October, 1887, granted a license for one year from that date, how could the county commissioners revoke it? The law also says that where a license is revoked the license money for the time that has not expired shall be refunded. In such a case, would the county commissioners, from the county treasury, refund the money for the unexpired term? Scarcely. These laws are to be construed, if possible, from the reading of the parts of the laws themselves, and then interpreted. Now, does not the very absence of anything in the law that city councils must revoke licenses in counties where the vote has been against license, and that from their city charters they must refund the moneys for the un-

expired terms, show that this law never was intended to apply to municipal corporations having special charters giving them this exclusive power? Then, if it was not, does not the record in this case exonerate the defendant from any liability under the law?

H. H. Keith, S. E. Young, and A. A. Polk, for respondent.

The local option law is constitutional and valid. Section 4 of the Organic Act declares that the legislative power should extend to all the rightful subjects of legislation not inconsistent with the constitution and laws of the United States. That the territorial legislature has the power to legislate upon all matters of general concern to the people of the territory there can be no question, and that congress invested it practically with the same power of local self-government as is exercised by the states is equally clear.

Every presumption is in favor of the constitutionality of the law, and the courts will declare a law unconstitutional only when it is clearly, palpably, and plainly inconsistent with the provisions of the constitution, and the burden is upon those who assail the act to show that it is repugnant to the constitution. *Morrison v. Springer*, 15 Iowa, 304; *Stewart v. Supervisors*, 1 Amer. Rep. 238; *Ogden v. Saunders*, 2 Wheat. 270; *Fletcher v. Peck*, 6 Cranch, 128; *Griffiths v. Commissioners*, 20 Ohio, App. A; *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. Rep. 698; *State v. Cooper*, 5 Blackf. 258; *Clark v. People*, 26 Wend. 606; *Morris v. People*, 3 Denio, 394; *State v. Able*, 65 Mo. 357; *Territory v. Farnsworth*, 5 Pac. Rep. 871; *Potter's Dwar. St.* 64, 65; *Cooley, Const. Lim.* (5th Ed.) 218; *Wellington, Petitioner*, 16 Pick. 87.

The act in question was a perfect law when it left the hands of the law-makers, mandatory in all its parts, and there is no delegation of legislative power in the provisions of said act. *State v. Court of Common Pleas*, 36 N. J. Law, 72, 13 Amer. Rep. 422; *Village v. Howel*, 70 N. Y. 286; *Fell v. State*, 42 Md. 71, 20 Amer. Rep. 83; *Locke's Appeal*, 72 Pa. St. 491, 13

Amer. Rep. 716; *Com. v. Weber*, 14 Bush, 218, 29 Amer. Rep. 407; *State v. Wilcox*, 42 Conn. 364, 19 Amer. Rep. 536; *Boyd v. Bryant*, 35 Ark. 69, 37 Amer. Rep. 6; *Com. v. Bennett*, 108 Mass. 27; *Com. v. Dean*, 110 Mass. 357; *Erlinger v. Boneau*, 51 Ill. 94; *State v. Cook*, 24 Minn. 247, 31 Amer. Rep. 344; *C. W. & Z. R. R. Co. v. Commissioners*, 1 Ohio St. 77; *Kane v. Commissioners*, 86 N. C. 8; *Bull v. Read*, 18 Grat. 88; *Bancroft v. Dumas*, 21 Vt. 456; *State v. Barker*, 26 Id. 357; *Smith v. Janesville*, 26 Wis. 291; *People v. City of Butte*, 4 Mont. 179, 47 Amer. Rep. 346; *State v. Noyes*, 80 N. H. 279; *Territory v. Scott*, 3 Dak. 357, 20 N. W. Rep. 401; Cooley, Const. Lim. (5th Ed.) 146-148.

The courts of many of the states have been called upon to determine more or less directly the validity of the acts of their respective legislatures that are not only similar to the one in question, but like it in every respect. In at least 15 of the states such acts are held to be valid and constitutional, while, so far as we have been able to find, the only states holding a contrary doctrine are Delaware, Iowa, and Texas. The case of *Maize v. State*, 4 Ind. 342, cited by appellant, is substantially overruled by *Groesch v. State*, 42 Ind. 547. The question involved in *Ex parte Wall*, 48 Cal. 279, is not the same as in the case at bar, and the decision in that case has been greatly modified by subsequent decisions in that state.

In *Locke's Appeal*, 72 Pa. St., the case of *Parker v. Commonwealth*, 6 Barr, cited by counsel for appellant, and freely quoted by them, is expressly overruled.

We do not deem it necessary to enter into any argument to show that the act in question is not in conflict with the act of congress passed July 30, 1886. It is neither local nor special in the sense contemplated by congress. It applies to every county in the territory alike, and confers no greater powers or privileges upon one county than another, but is general in its application.

It is claimed that the city of Sioux Falls is not included within the provisions of chapter 70, Laws 1887, by reason of

chapter 72, and that under its charter the city council have the exclusive right to grant license. Upon examination, such construction cannot be rightfully affirmed.

Chapter 72 is an amendatory act, and as such amends section 1, c. 26, Gen. Laws 1879, and therefore becomes a part of the provisions of the general law of 1879. The effect of such amendments is clearly set forth in *People v. Sweetser*, 1 Dak. 308. The principle is there clearly enunciated that "an amendment becomes a part of the original act, whether it be the change of a word, figure, or line, or striking out and inserting, or in any way modifying or altering its provisions." And, further, that "the amendment of a statute by a subsequent one operates, as to all acts done subsequently thereto, as though the amendment had been a part of the original statute."

It should also be noticed that chapter 72 of the Laws of 1887 was approved February 15, 1887, and chapter 26 of the Laws of 1879, as so amended, was then in force.

A careful examination of the provisions of the local option law of March 11, 1887, will make it evident that it was the intent of the legislature to make its provisions absolute in all counties in which a majority should vote "against the sale," and to abrogate and repeal all special laws and charters in any way inconsistent therewith. Section 6 provides that "all acts, special or general, so far as they conflict with the provision of this act, are hereby repealed."

It has been suggested by counsel that chapters 70 and 72 are acts *in pari materia*, and as such should be construed together, and effect given to each. This proposition is virtually disposed of by the above considerations, it being amendatory, and what was clearly the legislative intent.

The rule of construction urged can have no application to the acts in question, for the further reasons:

(1) The later act, approved March 11th, covers the whole subject-matter of the antecedent statute, and would repeal all previous statutes, even without an express repealing statute. *People v. Spensler*, 1 Dak. 289.

(2) The rule *in pari materia* does not go to the extent of controlling the language of a statute by the supposed policy of previous enactments, and cannot be resorted to where the language is plain and exact. *Goodrich v. Russell*, 42 N. Y. 177; *Ingalls v. Cole*, 47 Me. 530.

(3) The rule can only be invoked when the statutes relate to the same identical subject-matter. *Sedg. St. & Const. Law*, (2d Ed.) 210-212.

(4) These are different sets of laws, intended by the legislature to operate in different counties, and cannot be construed together.

Special give way to general laws when the legislature annexes to the latter a repealing clause abrogating all inconsistent local or special acts. *Bank v. Bridges*, 30 N. J. Law, 116; 4 Field's Lawyers' Briefs, 520; *Sloan v. State*, 8 Blackf. 361. A special act is repealed by a general act when that appears to have been the purpose of the legislature. *State v. Severance*, 55 Mo. 378; *Eichels v. Evansville, S. R. Co.*, 78 Ind. 261, 41 Amer. Rep. 561.

It is within the province of the legislature to alter, amend, or repeal a city charter or any part thereof. Section 374, Civil Code; *Cooley, Const. Lim.* (5th Ed.) 230-232; *City of St. Louis v. Allen*, 13 Mo. 400.

TRIPP, C. J. This action is an appeal from the district court of Minnehaha county, from a decree granting an injunction against the sale of intoxicating liquor under the "local option law," and presents many of the questions passed upon in *Territory v. O'Connor*, ante, 397, (decided at this term of court.) As to the points so determined, the opinion in that case will govern in this. This case, however, presents this additional question, to-wit: The charter of the city of Sioux Falls gives to the council exclusive power to license and regulate the sale of intoxicating liquors within the city, and it is contended by the defendant that chapter 72 of the Laws of 1887, providing that the amendment therein made shall not apply to cities having the exclusive right to license, must be construed to so far modify the "local

option law" as to make it inoperative in cities having such power by their charters to grant exclusive license. The section relied upon reads as follows: "That section 1 of chapter 26, General Laws of 1879, be amended by adding thereto, 'and *provided, further*, that intoxicating liquors shall not be sold in any quantities in counties where no license is granted by the board of county commissioners, except as provided for in section thirteen of this chapter: *provided*, that nothing in this act shall in any manner interfere with or invalidate any license granted by any city council acting under the authority of a special charter or act granting exclusive authority in the matter of granting licenses for the sale of intoxicating liquors.'" Chapter 72, § 1, Laws 1887.

The section 1, Laws 1879, which is thus amended, makes it unlawful to sell intoxicating liquors in less quantity than five gallons, without having obtained a license as thereafter provided; and it is thereafter provided that such application is to be made to the board of county commissioners, and such license "shall be granted by said board if they deem it expedient, and the applicant a proper person to engage in the same." The amendment was approved on the 15th day of February, 1887, and the "local option law" was approved March 11, 1887. Under the law of 1879, as amended by the act of February 15, 1887, the board of county commissioners were given control of licenses within their respective counties, except when, by statute already existing, a city, by special charter, had exclusive authority in the matter; and the object of the statute was to forbid and make unlawful the sale of intoxicating liquors when no license had been granted, to emphasize and make clearer the prohibition of the statute of 1879, in case of refusal to grant licenses by the proper authority.

The amendment is not an independent act. It was expressly made a part of the law of 1879, and, *ipso facto*, upon its passage, and from the date of its approval, it was an integral part of the law as amended. Later on, in the same session, and nearly a month thereafter, the legislature, recognizing the autonomy of

the law amended, and with a clear design to retain its main provisions in force, enacted the "local option law," so called. In some of its features it is directly in antagonism with the law of 1879. It takes absolutely away from the commissioners and council the power to issue license when the county has voted "against the sale," and in other ways, directly and by implication, repeals certain provisions of the former law. That the legislature had the power to expressly repeal any former enactments, whether of another or of the same session of the legislature, can hardly be controverted, and that it did repeal certain of the provisions of the law of 1879 by the enactment of the "local option law" must be admitted. Such being the case, the question is, how much did it repeal? The amendment made by chapter 72, having become a constituent part of the law of 1879, so far as the construction of the conflicting law is concerned, it stands the same as it would have stood if the entire act as amended had been passed at the same time; and in so far as the "local option law" conflicts therewith, it repeals it by necessary implication.

Sections 3 and 6, c. 70, Laws 1887, which provide: "Should a majority of the ballots cast at such an election be 'against the sale,' it shall be unlawful for the board of county commissioners of such county to issue or grant a license for the sale of intoxicating liquors in such county, or for any common council or officers of *any incorporated town, city, or village* in said county to grant or issue any license for the sale of such intoxicating liquors. * * * All acts, special or general, so far as they conflict with the provisions of this act, are hereby repealed,"—are, as admitted, in direct conflict therewith, and must be construed as not only repealing so much of the law of 1879 as is in conflict with it, but as repealing so much of any existing city charter or other special law as would seem to give power to grant licenses contrary to the terms of the later law. This is clearly the meaning and intention of the law. It is true that there are some omissions which the legislature might well have

supplied, and which have furnished material for the ingenious argument of counsel; but the court cannot shut its eyes to the general scope and purpose of the law, which were to allow the locality to deal with this question of police in its own way. It is a power often allowed to be exercised by cities, and sometimes by *quasi* municipal corporations, such as counties and towns. The demand is always necessarily greater for the exercise of such power in the cities and thickly populated centers than in the more sparsely settled portions of the country. Recognizing such fact, it is hardly to be presumed that the legislature intended to allow the people of the country to prohibit an evil that rarely exists, while the people of the city, where such sales are generally made, were not to have any voice in its enforcement, and to be denied its application. Such a construction would render nugatory the effect of such act, and deny its application to the correction of the very evil, and to the class of persons, it was intended to reach. It was intended to apply to the cities. The legislature could not have overlooked the fact that by special charters nearly all the cities have been given exclusive control over the sale of intoxicating liquors; and the words, "all acts, special or general, so far as they conflict with the provisions of this act, are hereby repealed," must have been expressly intended to make the law applicable to the cities as well as to the country. What other special law was in conflict with it? The legislature must have been presumed to have had some law in mind; the words are not presumed to be meaningless; the answer is evident; the meaning of the law is too plain to admit of doubt.

It is true, the legislature might have provided for local option within the city as separate from the country, and have allowed the people of the city to regulate such matters in their own way, without dictation from those living without its limits; but this argument is one to be made to the legislature, not to the courts. We have nothing to do with the wisdom or the propriety of the act drawn in question. We have sufficient to occupy our time in construing and determining the legality of leg-

isolation. We have no doubt as to the construction or the legality of this act, and the judgment of the lower court is affirmed.

All the justices concur, except THOMAS, J., not voting.

PRIELKE, Respondent, v. CHICAGO, M. & ST. P. RY. CO., Appellant.

1. Appeal—Review—Weight and Sufficiency of Evidence.

Though much suspicion is thrown upon the testimony of a witness by the circumstances and the testimony of others of equal means of information, still, where he was not impeached, swore positively to the facts, and no motive for false swearing appears, an appellate court will not disturb the verdict founded on his testimony when a new trial, on the ground of the insufficiency of the evidence to support the verdict, has been denied by the trial court.

2. Railroads—Continuous Fire—Negligence—Proximate Cause—Trial—Instructions.

In an action against a railroad company for damages caused by a fire seen for the first time in the afternoon, on an issue of its connection with one claimed to have been negligently set out in the morning, the court said to the jury: "Unless you find the fire in the morning has a connection with the afternoon fire, the plaintiff expects a verdict for the defendant;" and this being the only reference in the charge to the proximate cause of the injury, *held* misleading, and susceptible of an erroneous construction.

3. Same—New Trial—Appeal.

While the mere omission to instruct on a given proposition, there being no request therefor, is not error, still, if the appellate court can see the jury was misled by the instructions given, it will grant a new trial.

4. Same—Sufficiency of Evidence.

Where the evidence was that a fire set out through alleged negligence in the morning was believed to have been extinguished, and it appeared the damage was done by a fire seen for the first time in the afternoon, a strong wind having arisen in the mean time, and with its aid the latter fire spread rapidly in the direction of the plaintiff's property; and the only evidence of connection between the two fires was mere opinion, and the circumstances were that it was as reasonable to suppose the extension of the afternoon fire to that of the morning as the one of the morning to the afternoon, the appellate court was inclined to hold that the morning fire was not the proximate cause of the injury; but *held*, if the

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6 445
41* 669
43* 814

case were submitted to the jury, it ought to have been done under such instructions as would have given them clearly to understand that they were to determine whether or not the morning fire was the direct and proximate cause of the injury.

(Argued May 12, 1888; reversed May 25; opinion filed February 4, 1889.)

Appeal from district court of Richland county; Hon. W. B. McCONNELL, Judge.

Ball, Wallin & Smith, for appellant.

It is conceded that there was no evidence, direct or circumstantial, that connected the defendant with the ignition of the fire which did the damage to the plaintiff; that is, the afternoon fire, if the same was separate and distinct from the morning fire.

Was there any evidence, direct or circumstantial, sufficient in law to establish any connection between the A. M. and the P. M. fire? See Gr. Ev. (Redf. Ed.) § 13; *Commonwealth v. Webster*, 5 Cush. 295, 312.

The fact sought to be proved was that the defendant ignited the afternoon fire, and that in fact it was but a continuation of that of the forenoon. In view of all of the facts and circumstances, no reasonable connection, in the relation of cause and effect, founded upon "experience, and observed facts and coincidents," could possibly be established between the two fires. Therefore, the court should have directed a verdict for the defendant, for the reason that there was no evidence from which the jury could reasonably find that the defendant caused the injury complained of.

Was there a fire in the morning? We think the evidence shows there was not.

The existence of the morning fire was one of vital consequence to the defendant; and, this being true, it is equally clear, under the adjudications, that the defendant under the evidence in this case was entitled at the hands of the court to a charge which would be explicit and emphatic on the point, and also to have such charge given in any proper language which should be chosen

by the defendant's counsel. Such a request was framed, and presented to the court, but was refused. We submit that, while the learned justice who tried the case did several times during his charge to the jury allude to the matter of the origin of both the alleged A. M. fire and the conceded P. M. fire, that none of these references brought out and emphasized the vital nature of the question as to whether or not there was a fire in the morning as a distinct matter of fact. When the court last referred to the A. M. fire it used the following language: "Unless you find as a matter of fact that the fire first seen by Lindgren has a connection with this fire, the plaintiff expects a verdict for the defendant."

It is clear that the language was very prejudicial to the defendant in this: (1) It assumes the fact in controversy to be true, i. e., that there was in fact a forenoon fire; and (2) that the plaintiff's witness Lindgren as a matter of fact saw an afternoon fire.

A charge which assumes the existence of controverted facts is erroneous. *Smith v. Dukes*, 5 Minn. (Gil.) 301; *Jones v. Towns*, 26 Minn. 172, 2 N. W. Rep. 473.

We are satisfied that this inadvertence of the judge, together with the refusal to give the defendant's request in words chosen by its counsel, was error, which operated to the defendant's prejudice, and also was error of law under the authorities. Code Civil Proc. § 248; *Galloway v. McLean*, 9 N. W. Rep. 98.

W. S. Lauder and Folsom Dow, for respondent.

There are but two questions to be determined upon this appeal:

1. Was the fire which destroyed plaintiff's property set out by the defendant?

2. If this fire was set out by defendant, was defendant guilty of such negligence as would render it liable for the damages it occasioned?

In support of the view that the evidence was sufficient to war-

rant the jury in finding as a fact that the fire was started by a spark, coal, or cinder from defendant's locomotive, see *Wood, Ry. Law*, 1348; *Pierce, R. R.* 436, 437; *Woodson v. Milwaukee & St. P. Ry. Co.*, 21 Minn. 60; *Karsen v. Milwaukee & St. P. Ry. Co.*, 29 Minn. 12, 11 N. W. Rep. 122; *Gibbons v. Wisconsin V. Ry. Co.*, 28 N. W. Rep. 170; *Wolff v. Chicago, M. & St. P. Ry. Co.*, 25 N. W. Rep. 68; *Butcher v. Vaca V. R. Co.*, 8 Pac. Rep. 174; *Christ v. Erie Ry. Co.*, 58 N. Y. 638; *Field v. N. Y. C. Ry.*, 32 N. Y. 339; *Hoyt v. Jeffers*, 30 Mich. 181, 91 U. S. 454.

It is contended by the appellant that the court erred in refusing to charge the jury that, "if you find as a fact from the evidence that no fire started in the forenoon, your verdict must be for the defendant."

We think that, had the jury returned a verdict for the defendant based upon the theory that no fire originated in the forenoon, as testified to, the same would have been in direct conflict with all of the evidence upon that point, and it would have been the duty of the court to have at once set it aside.

The court in his charge did not assume that there was in fact a forenoon fire. On the contrary, it left the whole question of the origin of the fire that destroyed the plaintiff's property to the jury.

In support of the second proposition, see *Pierce, R. R.* 434, and cases cited; *Wood, Ry. Law*, 1850, 1862, and cases cited; *Sibblrud v. St. Louis Ry. Co.*, 29 Minn. 63, 11 N. W. Rep. 146; *Kellogg v. Chicago & N. W. Ry. Co.*, 17 N. W. Rep. 132; *Wolff v. Chicago, M. & St. P. Ry. Co.*, *supra*; *Jones v. Mich. C. Ry. Co.*, 26 N. W. Rep. 662, and note; *Gibbons v. Wis. V. Ry. Co.*, *supra*.

TRIPP, C. J. This is an action brought to recover for damages sustained by fire alleged to have been set out by defendant's engine upon its right of way, which spread and extended to the plaintiff's land, destroying hay, buildings, trees, and other property. There is no contest between plaintiff and defendant but that the fire occurred which did the damage, and that the amount of the damages found by the jury is a reasonable and

proper amount; but the defendant insists that it did not set the fire, and that the evidence is insufficient to sustain the verdict in that respect.

It appears from the abstract in the case that in the fall of 1885, some time in the latter part of September or forepart of October, the defendant's railway ran and was located across sections 6, 7, and 18, township 135, range 149, extending in a north-westerly direction. The plaintiff was the owner of certain lands in section 5, about a mile in a north-easterly direction from where the fire was first discovered. The theory of the plaintiff is that the train of defendant, passing south in the forenoon, set fire to the dry grass upon its right of way adjoining the land of one Johnson, in section 7; that this fire backed south against the wind during the forenoon, and was the same fire that was discovered in the afternoon running in a north-easterly direction, and which damaged the plaintiff. There is a section road running east and west between sections 6 and 5 on the north, and 7 and 8 on the south. In section 7, immediately south of this road, and adjoining the railroad on the east side, was a field of breaking, belonging to one Erick Johnson, extending north and south about one-half mile, and occupying the triangular piece of land on the east side of the railroad, except a small piece of prairie in the angle where the railroad and highway cross each other, and a small building spot south of the highway, and between it and the breaking. Along the railway, and between the road-bed and breaking, the right of way was covered with dry grass, some of which had been mowed, and lay upon the ground. Along this right of way, and parallel with the railroad, there was also a carriage road used by teams and carriages.

Lindgren, a witness for the plaintiff, testified that during the forenoon he was at work on his place on section 6, north of the section-line road, and saw the defendant's train go south, and that in a few moments thereafter a fire sprang up along the right of way "close into the track," at about the southern angle of the triangular piece of prairie between the Johnson breaking and

the railroad; that this fire burned over this small piece of prairie, and burned up to Johnson's buildings, but that he succeeded in saving the buildings and stacks and "put out the fire;" that after dinner, and about 2 o'clock in the afternoon, he discovered "another fire" about 40 rods further south, and at the south extremity of Johnson's breaking; that the wind was then blowing from the south-west towards the plaintiff's premises, which it soon reached, and did the damage complained of. This witness did not see any fire after the fire in the forenoon until the fire about 2 o'clock P. M., nor did any one but him see the fire in the forenoon. Witness was permitted to give his opinion that the fire he saw in the morning backed south against the wind until it got past the Johnson breaking, and then was carried in a northeasterly direction onto the land of plaintiff; and one other witness, Mr. Dow, one of plaintiff's attorneys, was permitted to testify that something over a week after the fire he examined the premises, and found the prairie grass on defendant's right of way between the road-bed and the Johnson breaking burned off, and the entire right of way west of the breaking burned over.

Defendant contends—*First*, that the evidence was insufficient to prove there was any fire in the forenoon; *second*, that there is no evidence to prove that the fire in the forenoon and the fire in the afternoon were the same.

1. It is true that much suspicion is thrown upon the evidence of Lindgren as to the fire he claims to have extinguished west of the Johnson breaking. The land in that vicinity is shown to be comparatively level, with nothing to obstruct the vision for several miles, and along the entire right of way where the fire is claimed to have originated. A number of people were at work during the entire forenoon in the vicinity, and in full view of the premises. Mr. Marty, a witness for the plaintiff and defendant both, testified that he was at work in section 8, across a quarter section from the Johnson breaking, and in full view of it; that he was plowing during the forenoon; that he saw no fire, and that if there had been a fire he could and probably

would have seen it; that the first fire he saw was about 2 o'clock in the afternoon, south of the Johnson breaking.

Erick Johnson, the owner of the Johnson breaking and premises, testified that he was away from home during the forenoon; that when he got home in the afternoon the fire had gone past his place to the north-east, and that Lindgren, the witness, was there, and had his oxen and team there, and told him (Johnson) that he had put out the fire around his (Johnson's) place, but did not say anything about a fire in the forenoon.

Swan Swanson testified that during the forenoon he was plowing on the east side of the railroad, and south of the Johnson premises, and saw no fire during the forenoon; that he was at Anderson's place, on section 8, east of the school-house, when the fire started on the right of way south of the Johnson breaking, and that it was "round like,—just as if it had been lately started." Ole Anderson, for whom Swanson worked, testified that during the forenoon he was plowing in section 8, at the south-east corner of the north-west quarter; that there was nothing to obstruct his view, and that, if there had been a fire on the right of way, he could and probably would have seen it; and he further ventures the opinion that he "don't believe there was any such fire there in the forenoon;" that he was at his own house when the afternoon fire started; that it started directly west of his house, and west of the school-house, and south of the Johnson breaking,—about 50 or 60 rods; that he raised up from his seat, and said to Swan, "There is a fire just starting;" and that it was just about 2 o'clock at that time. Ethleen Kuppenberg, a school-teacher, was at the school-house in section 7, west of Anderson's house, towards the railroad, and testified that she was "on the watch for prairie fires;" that the first fire she saw was about 2½ P. M., directly west from the school-house, near the railroad; that "it had just started;" that she is positive as to the time, owing to her recess that day; and that she never heard of any forenoon fire until a week ago.

The evidence as to the forenoon fire rests almost entirely upon the testimony of Lindgren. No one else saw it, though

they had nearly equal opportunities with him, and were no doubt actuated by the usual vigilance that characterizes the observation of the farmer at that time of year with reference to prairie fires. There was, however, no impeachment of this witness. He swore positively to the *facts*, as he claimed them, and no motive was shown for willful false swearing upon his part. The jury have had the opportunity of seeing the witnesses, and weighing their testimony, under the instructions of the court; and the lower court has denied a new trial on this ground, and we cannot, without violence to the law governing appellate courts, disturb the finding.

2. Is there sufficient evidence to prove that the fire in the forenoon and the fire in the afternoon were the same fire? A careful analysis of the evidence, and the proceedings had, convinces us that one proposition of law has been entirely overlooked in the trial and consideration of this case; and while we deem the question properly here, under the exceptions taken, no reference has been made to it directly in the argument of counsel, nor was it mooted in the trial of the lower court; and that is, the entire absence of any evidence to show that the fire, if it resulted from the forenoon fire, was a continuous one, or that the fire in the forenoon was the proximate cause of the damage sustained by the plaintiff. It was from a mile to a mile and a half from the initial point of the fire first seen in the afternoon to the premises of the plaintiff. The fire, in its most direct course, must cross the farms of several others, besides the highway; and while the fire seen at the right of way in the afternoon, or the "afternoon fire" as it is designated by the witnesses themselves, is shown to have been continuous, there is not only an entire absence of any showing that the fire seen by Lindgren continued to burn and was the same fire that did the injury, but the positive evidence is that the forenoon fire was entirely extinguished. At most, there is a mere opinion of the witnesses that the forenoon fire backed up and became the afternoon fire; and there is some evidence that the right of way along which it would have made such journey was burned over. But all this

could have been done by the fire seen first in the afternoon. It could have run west of the breaking at the same time it ran east. No one pretends to say it did not, and, if the evidence of Lindgren is to be believed, there was but little left on the west side of the breaking to burn when he put out the forenoon fire. Besides, the witness Dow testifies that the right of way was burned out *clean*. "This strip was burned clean out, close to the road here, next the building,—burned clean from the track and the breaking, down to the point right at the south end of the breaking." And this he repeats several times,—“burned right up close to the railroad track.” This is not usual with back fires. This testimony would tend to show that it was burned by a direct fire from the south. There is no evidence upon which the court can say the jury would be warranted in finding the fire of the forenoon was the proximate cause of plaintiff's loss. There is no direct evidence to prove this fact, but the direct evidence is to the contrary, and the circumstances relied upon to prove such theory tend as strongly, and more so, to prove the opposite one.

The doctrine of proximate and remote cause has undergone great discussion in this country and in England; and, while the courts have attempted to define what is proximate and what is remote damage, it may be truthfully said: "There can be no fixed and immediate rule upon the subject that can be applied to all cases. Much must therefore depend upon the circumstances of each particular case." *Page v. Bucksport*, 64 Me. 53. The difficulty is not in the truth of the maxim, *causa proxima non remota spectatur*, but in its application. Greenleaf lays down the rule that "the damage to be recovered must always be the natural and proximate consequence of the act complained of." 2 Greenl. Ev. § 256. Parsons, after referring to the confusion in which the question is left by the decisions, says: "We have been disposed to think that there is a principle derivable, on the one hand, from the general reason and justice of the question, and, on the other hand, applicable as a test in many cases, and perhaps useful, if not decisive, in all. It is that every defend-

ant shall be held liable for all of those consequences which might have been foreseen and expected as the result of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into his consideration." 2 Pars. Cont. 180.

Proximate and remote damages are the result of proximate and remote causes, reasoning in an inverse order. Strictly speaking, there are no remote causes and no remote damages; the proximate cause is that which produces the damage. The remote cause is used, by comparison, as the irresponsible agent which seeks shelter behind the responsible one. The proximate cause is the *vis major* which intervenes and usurps the place of the primary force, or unites with and overcomes it, so as to become the principal and real cause of the damage sustained; or it is the primary cause, traced back through intervening and intermediate causes, by natural and continuous succession, from the injury resulting to the wrong committed. The intermissions existing, the time elapsing, or minor cause intervening, do not affect the conclusion, so that the original cause be continuously operative as the principal factor in producing the final result. The cases have generally arisen where a large number of buildings, separate and detached from each other, have been successively destroyed; and, while the cases are by no means harmonious, we think it may be safely stated that whenever the fire has been of that character that the firing of the second or third building, or others in succession, was the direct and natural result of the firing of the first, under the circumstances of the case, the original fire was the proximate cause. But if the location of the buildings was so remote, or the location and circumstances such, that the party committing the wrong could not naturally have expected such a result, or such result would not naturally have flowed from such a cause, then it is not proximate, but remote.

The cases of *Ryan v. Railway Co.*, 35 N. Y. 214, and *Railway Co. v. Kerr*, 62 Pa. St. 353, are generally cited as holding that, as a matter of law, the firing of the second building by

taking fire from the first is remote, and not proximate; but I think a careful study of these cases, and a limitation of the doctrine announced to the facts of each case, will bring them in line with the decisions of other states where no statutes have intervened to govern the opinion of the courts. Chief Justice THOMPSON, in *Railway Co. v. Kerr*, *supra*, uses the following language: "There might possibly be cases in which the causes of disaster, although seemingly removed from the original cause, are still incapable of distinct separation from it. * * * The maxim of *causa proxima non remota spectatur* is not to be controlled by time or distance, but by the succession of events." And such is the view taken of these cases in the states where they were rendered. *Railway Co. v. Hope*, 80 Pa. St. 373; *Webb v. Railway Co.*, 49 N. Y. 420. The rule is very clearly and succinctly stated in *Railway Co. v. Kellogg*, 94 U. S. 475, a case in which a steam-boat had set fire to an elevator, which communicated to a mill and lumber-yard, disconnected and distant therefrom about 388 feet. The lower court had been asked to charge, as a matter of law, that the injury was too remote, and the refusal of the court so to charge was alleged as error; and the supreme court, on appeal, in affirming the action of the lower court, and holding that under the circumstances of that case it was a proper question for the jury, says: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science, or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. *Scott v. Shepherd*, 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole,

or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen, in the light of the attending circumstances.

* * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But, when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. * * * In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are discovered by new and independent agencies; and this must be determined in view of the circumstances existing at the time."

New Jersey, in a carefully considered case, states the rule as follows: "In the rule which limits a recovery for a tort to those damages which are its natural and proximate effects, the natural effects are those which might reasonably be foreseen,—those which occur in an ordinary state of things; and the proximate effects are those between which and the tort there intervenes no culpable and efficient agency." *Wiley v. Railway Co.*, 44 N. J. Law, 247. And in Maryland her courts have adopted the same rule: "In a case where the fire has not been communicated directly to the plaintiff's property by sparks or cinders from the

locomotive, as where it has spread from its first beginning, and thus been communicated indirectly to the plaintiff's property, it is a question proper to be submitted to the jury to determine, from all the facts of the case, whether the injury complained of is the natural consequence of the defendant's negligence, or whether it has been caused by 'some intervening force or power, which stands naturally as the cause of the misfortune.' " *Railway Co. v. Gantt*, 39 Md. 115, 11 Amer. Ry. Rep. 210. Justice MILLER in *Insurance Co. v. Tweed*, 7 Wall. 52, says: "One of the most valuable of the *criteria* furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

In *Fent v. Railway Co.*, 59 Ill. 349, the facts were similar to those in *Railway Co. v. Kellogg*, *supra*. The railway company had set fire to a warehouse by sparks from its engine, which had communicated to plaintiff's buildings, about 200 feet distant, but disconnected therefrom; and Judge LAWRENCE, in a very well-considered opinion, goes over the whole doctrine, English and American, and criticises the cases of *Ryan v. Railway Co.* and *Railway Co. v. Kerr*, *supra*, with much severity, as announcing a doctrine at variance with the decisions of all other American courts, and as standing alone. This case was before the supreme court on appeal from the decision of the lower court in sustaining a demurrer to evidence, under the practice of that state; the question being whether, as a matter of law, the injury was remote. The court held that it was, under the facts of that case, a proper question for the jury, and reversed the case. In delivering the opinion of the court Judge LAWRENCE laid down the rule as follows: "If a loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth,—the latter being so situated that its destruction is a con-

sequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency,—if, for example, after its ignition a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind,—such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible.” In a later case in that same state, (*Railway Co. v. Muthersbaugh*, 71 Ill. 572,) the second building was situated 101 rods from the first building set on fire from the engine. It was covered with straw, and there were no intermediate buildings. A high wind was blowing in a direct line towards it from the first building burned. The court held, as a matter of law, that the injury was too remote; citing with approval the rule announced by Judge LAWRENCE in *Fent v. Railway Co.*, *supra*.

Rorer on Railways, after an elaborate review of the authorities, states the doctrine derived therefrom as follows: “To our mind the American cases clearly recognize seven classes of cases settled by authorities in regard to damages by fire communicated from engines of railroad corporations, each of which is to be regarded as controlling, and as a rule of decision, within its own respective judicial sphere. (1) That, except where altered by express statutory enactment, there prevails, everywhere in the American courts, the well-known common-law rule that one is not liable for the consequences to others of a prudent and lawful use of fire upon his own premises, if without fault or negligence on his part, although it escape, if without his fault, to that of his neighbor, and do him an injury there. (2) That one is liable for an injury that occurs to another by an imprudent or unlawful use of fire on his own premises; or, if properly used there, then for negligently suffering it to escape to the premises of another, whereby a damage is done to the owner thereof. (3) But, to sustain an action in such cases, the injury must be the direct and proximate result of solely the act complained of; or, in other terms, the act complained of must alone have been the

direct, proximate, and sole cause of the injury and damage sustained, and not merely remotely so. (4) That the cause of the injury is proximate, and the damage is the proximate result thereof, so long as the fire is continuous in its progress and ravages, by an unbroken chain or connection. (5) That the cause of the injury is but remote, and the damage is but the remote result thereof, as to all the ravages of the fire caused by a rekindling thereof, or communication of it anew, from and beyond where there occurs an open break in the burning or chain of its continuity; that in such latter case the first fire, and not the original negligence of the party setting it out, is the cause of the latter, and of the injury done thereby; and that, therefore, the original setting out and the latter injury are, in their relations to each other, remote, and no liability exists. (6) Under the statute in Massachusetts, the rule of liability, as settled in the courts of that state, is that railroad corporations are absolutely liable for all damages caused by fire communicated from their engines, irrespective of the question of negligence. (7) That by statute in some others of the states, where the negligence of the company is yet an ingredient of liability, the injury is made to be presumptive evidence of negligence, and the burden is shifted onto the railroad companies, defendants, to negative the same by proof of proper care." 2 Ror. R. R. 806-808.

The case of *Doggett v. Railway Co.*, 78 N. C. 305, is parallel, and almost identical, with the one at bar. The original fire set by the engine occurred about 10 or 11 o'clock in the forenoon, and, having run across the lands of several persons, and burned several fences, had been extinguished, as was supposed, before it reached the land and fence of plaintiff; but later, and somewhere about 3 o'clock in the afternoon, the fire was discovered burning the fence of plaintiff, and subsequently did the damage complained of. It was presumed that the original fire of the forenoon had not been all extinguished, and was rekindled by the wind. There was no direct evidence, otherwise than could be conjectured from its path, to connect the fire of the forenoon with that of the afternoon fire which did the damage.

The court, in reviewing the judgment of the lower court upon a verdict against the company, says: "The fire had been checked, and was supposed to have been extinguished by those who had been contending with it, and they had retired from the ground. Here was a cessation of the cause, a rest,—an interval of what duration is not stated. What occurred afterwards, resulting in the plaintiff's injuries, was remote damage, which could not be reasonably foreseen or anticipated by the defendant as a necessary or probable result of the first negligence; and in point of fact those who were on the ground, and the witnesses and the actors at the point of conflagration, and whose judgment is entitled to most weight, did not anticipate a further spread of the fire. These persons were the neighbors, and probably the owners of the fences on fire, and as such were most deeply interested in securing themselves against present and future danger. If they did not contemplate a renewed outbreak of the fire, upon no reasonable hypothesis can it be assumed that the defendant contemplated it as a necessary or probable result of the first cause. The facts do not constitute such a continuous succession of events, so linked together as to become a natural whole, which would make it a case of proximate damages; but the chain of events, by the temporary cessation and extinguishment of the fire, was so broken that it became independent, and the final result cannot be said to be the natural and probable consequence of the primary cause,—the negligence of the defendant. The maxim here applies, *causa proxima non remota spectatur*."

Let us apply the doctrine of these cases to the one at bar; and conceding, as the jury must have found, the fact to be that there was a fire in the forenoon, there must have been a number of hours intervening between the time the first fire was supposed to have been extinguished and the time the second fire was discovered. Lindgren testifies that it was about 11:30 A. M., but several witnesses swear that he had told them at other times prior to the trial that it was about 10:30 A. M.; and the time-tables which were in evidence fixed the time for the departure of this

train from the station north at 9:05 A. M., and the time of its arrival at the station south as 9:55. The evidence, however, showed that that train was frequently late; so that the probability is that the fire did not occur later than some time between 10 and 11 A. M. The witnesses substantially agree that the afternoon fire occurred some time between 2 and 3 P. M., so that there must have existed an interval of at least three or four hours between the time the first fire was extinguished and the occurrence of the second fire. The testimony is that the wind came up strong from the south-west at about 2 o'clock, and that the fire spread with great rapidity. Can it be said that the defendant, if it set the first fire, could have anticipated such a result? Could it be presumed to have foreseen more than the witness on the ground, whose own property was endangered, and who swears that he put it out and went home? He must not only have presumed that the fire would spread no further, but he must have felt sure and certain that it was extinguished. An igniting or firing of the prairie grass at that season of the year was like bearing a lighted candle into an open powder magazine; and if the witness, with such danger confronting him, would have felt sufficiently certain that no further damage could result from the forenoon fire, can it be said that the defendant ought originally to have foreseen the actual and final result?

Again, was not the wind, which sprang up with renewed force in the afternoon, the intervening agency, the proximate cause, which produced the injury complained of? If some human agency had rekindled the smouldering fire, and scattered it along the dry, unburned grass, producing the same result, no one would have said the first wrong-doer was responsible for the loss occasioned by the subsequent fire; and ought the defendant to be the more responsible because the power was superhuman?

In each case the question is, what was the direct cause of the result? There must be an end somewhere; there must be some place at which the courts will call a halt, and say that it will refuse longer to trace effect to primary cause, where the

object is to fix liability and award compensation for damages sustained and wrong suffered. If this were not so, in the infinite changes that occur, and the intimate relations that exist, between all agencies, natural and artificial, almost any man might be liable to be indirectly connected with a wrong committed. No better rule of compensation can be devised than that allowed by the rule making the wrong-doer liable for such damage as might be reasonably anticipated by him under the circumstances in which he was placed when he committed the act complained of. This rule has been approved by this court in *Hannaher v. Railway Co.*, ante, p. 1, 37 N. W. Rep. 717, (determined at the February term of this court, 1888,) and the cases there cited, where the rule is laid down that, in the construction of roads, bridges, and similar work, the workmen are only required to construct them in the usual and ordinary manner, and are not required to provide against tornadoes, cyclones, and unusual superhuman force.

But while we are inclined to hold that upon the testimony as it is presented in this case, that the fire claimed to have been set by the defendant in the forenoon was not the proximate cause of plaintiff's loss, we are not required to pass finally upon this question; for there was, in our judgment, clearly a mistrial of this case, in that, if the facts would have warranted a submission of this case to the jury, it should have been submitted so that this question could have been passed upon by them. What is the proximate and remote cause is generally a question of fact, and must be submitted to the jury under proper instructions from the court; and while in this case we are inclined to think the court was warranted in refusing the instructions asked for by the defendant, and while it is also generally true that the mere failure of the court to instruct upon a given proposition, upon which he is not asked to instruct, is not error, yet if, in his failure to so instruct, the appellate court can see from the instructions given that the jury were misled, it is its duty to grant a new trial. An inspection of the charge in this case reveals the fact that the court touched upon this ques-

tion but once, and he then told them: "The negligence charged here is the negligence charged in the manner in which they kept their right of way. Counsel for plaintiff desires me to say that, it being demonstrated that this fire was at a point below the plowed strip, as indicated upon the diagram, that being agreed to have been in the afternoon, unless you find as a matter of fact that the fire as seen by Lindgren has a connection with this fire the plaintiff expects a verdict for the defendant; so that takes away a great deal of my charge." This was not only misleading, but if it was meant thereby to tell the jury that they could find for the plaintiff, *if they find that the second fire had any connection with the first fire*, it was error; for, as we have seen, the jury must not only have found a connection between the two fires,—they must also have found that the first fire, or the wrongful act causing it, was the proximate cause of the second fire, and of the damage arising therefrom. This is the only place in the entire charge in which the court referred to any connection between the first and second fire, and he made this statement so prominent as to tell the jury that it "took away a good deal of his charge" already given. If the cause was submitted to the jury at all, it should have been submitted under such instructions as would have given them clearly to understand that it was for them to determine whether the fire in the forenoon, claimed to have been seen by Lindgren, was the direct and proximate cause of the fire by which the plaintiff sustained the damage complained of.

There was clearly a mistrial in this case, and, as other evidence may be produced upon a new trial which may connect the fire in the forenoon with that in the afternoon, and make it the primary cause, the judgment of the lower court is reversed, and the cause remanded for a new trial, subject to the opinion of this court therein. All the justices concur.

HARTWELL, Respondent, v. NORTHERN P. E. Co., Appellant.**1. Carriers—Limitation of Liability by Notice—Trial—Instructions.**

In an action against an express company for the loss of a trunk, the defense being an omission to make a written claim within the time required by the shipping contract, or receipt, which was not signed by the consignor, the court charged the jury no written claim was necessary, and that, if they found that the plaintiff made a claim to the company's agent at the point where the trunk was shipped within the required time, and that the company had knowledge of the loss, they would be authorized in finding a verdict for the plaintiff. Section 1263, C. C., provides: "A consignor * * * by accepting * * * a written contract for carriage, with knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated. But his assent to any other modifications of the carrier's * * * obligations contained in such instrument can only be manifested by his signature to the same." *Held*, under this section the defendant had no reason to complain of this charge.

2. Same—Limitation of Liability by Special Contract—Signature.

Bills of lading and contracts are not "special contracts" within the meaning of section 1261, C. C., providing that "the obligations of a common carrier * * * may be limited by special contract," unless they are signed by the consignor or consignee.

(Argued February 21, 1888; affirmed February 24; opinion filed February 4, 1889.)

Appeal from the district court of Richland county; Hon. W. B. McCONNELL, Judge.

J. C. Bullitt, Jr., for appellant.

The clause in the receipt was not complied with. Was the clause valid and binding?

Whatever doubts may formerly have existed, this question cannot now be considered an open one, and must be answered affirmatively. Such a regulation is not unreasonable, and must be complied with as a condition precedent to the right to recover. *Express Company v. Caldwell*, 21 Wall. 264; *Goggin v.*

Kansas Pacific R. Co., 12 Kan. 416; *Cole v. Western Union Telegraph Co.*, 33 Minn. 227, 22 N. W. Rep. 385.

There is not a *scintilla* of evidence to show that any claim for loss was made at the Wahpeton office or elsewhere at any time and the condition was not complied with in any form.

The claim should have been presented within the prescribed time, even though the loss occurred through defendant's negligence. It is a familiar rule that a common carrier is responsible for all damages occasioned by its negligence, notwithstanding any contract which it may make for exemption. The Civil Code, § 1262, is merely declaratory of the common law. But this rule does not affect a stipulation that claims for loss must be presented within a prescribed time, because such a stipulation is not a contract for exemption from liability for negligence, and is perfectly consistent with holding the carrier to the fullest measure of good faith and diligence. It excuses no negligence. It merely prescribes a duty to be performed by the shipper before he will be entitled to maintain his action, and must be complied with in all cases, whether the carrier is negligent or not. *Express Co. v. Caldwell*, 21 Wall. 264, 268; *Cole v. Western Union Telegraph Co.*, 33 Minn. 227, 228, 22 N. W. Rep. 385.

The court therefore erred in submitting the case to the jury when there was no evidence to show that a claim for loss had been presented within 90 days from the date of shipment, and in instructing the jury that a written claim was not necessary; and the verdict is wholly unsupported by the evidence, inasmuch as there is no evidence that any claim was made.

W. S. Lauder, for respondent.

Respondent was not bound by the terms and conditions of the receipt, for the reason that her "assent thereto was not manifested by her signature to the same." Civil Code, § 1263.

TRIPP, C. J. This is an action brought by the plaintiff for recovery of the value of a certain trunk and its contents, lost by

the defendant express company in shipping over its line from Wahpeton to Wyndmere, in the territory of Dakota.

The defense, so far as it affects this appeal, was that the trunk was shipped by plaintiff under an express contract with the defendant that the defendant, in case of loss, should not be responsible in a greater sum than \$50; and that in no event should the defendant be liable for loss unless the claim therefor should be presented to the defendant in writing, at its office in Wahpeton, within 90 days from the time of making the contract; and that no such claim was ever made until long after the period of 90 days.

The jury having returned a verdict of \$50 and interest, under the charge of the court, and judgment having been rendered thereon in favor of the plaintiff for the amount of the verdict and costs, the defendant appealed to this court, claiming that there was no sufficient evidence to sustain the verdict, in that there was no evidence of any claim, in writing or otherwise, having been presented to the defendant within 90 days, as stipulated in the receipt given the plaintiff, and that the court erred in its instructions to the jury.

The case shows, as it appears from the abstract, that one Harwood had brought the trunk from the state of New York, and at Wahpeton, the end of his journey, had delivered it to the defendant express company, to be delivered to the plaintiff at Wyndmere, her home, and that he took from the defendant's agent at Wahpeton a receipt, which, among other provisions, contained the following: "In no event shall the company be liable for any loss or damage, unless the claim thereof shall be presented to them in writing at this office within ninety days after this date, in a statement to which this receipt shall be annexed. The party accepting this receipt hereby agrees to the conditions herein contained." The receipt was signed by the agent of the company at Wahpeton, but was not signed by the plaintiff, nor by Harwood, acting for her. This receipt Harwood says he forwarded in a letter to the plaintiff, but she says

she did not receive it, and its contents were supplied by secondary evidence.

The court instructed the jury that under the contract, if the plaintiff was entitled to recover, she could not recover to exceed \$50, with interest at 7 per cent. from the day of shipment. The court further instructed the jury, of which defendant complained, and to which it excepted, as follows: "But if you find that a claim was made by the plaintiff, or by any one authorized to act for her, to the company, through its agent at Wahpeton, within ninety days, and that they had knowledge of the loss of the trunk and its contents, then you are authorized to find a verdict for the plaintiff. *Second*. I will charge you, further, that if you find from the evidence in the case that a claim was made within ninety days, and the company had a knowledge of the loss of the trunk within that time, and, further, that this claim was made upon the agent at Wahpeton, that no written demand is necessary."

Under the issues as submitted to the jury, they must have found that the claim was made within 90 days; and the defendant claims there was no evidence whatever of any claim in writing being presented to the defendant, that an oral claim was not sufficient under the terms of the contract, and that the charge was misleading. In reply to this, the plaintiff in this court contends that the charge was more favorable to defendant than he was entitled to,—*First*, that under our statute (section 1263, Civil Code) the receipt in the nature of a bill of lading was not a contract binding on her, because her "consent was not manifested by her signature thereto;" and, *second*, that the condition of the contract was substantially complied with.

Section 1263 of our Civil Code reads as follows: "A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same."

The language of the section does not seem to be ambiguous, and, if it means what on first reading seems to be its express meaning, we shall not be required to examine the evidence presented in the abstract to determine whether the terms of the alleged contract were complied with. The section comes from the proposed Civil Code submitted by the New York commission to the New York legislature, but enacted for the first time in this territory in 1866, and in California subsequently, in 1872. It comes to us in the same language reported by the commission, and was adopted by California with no material change. This section, as well as the two immediately preceding, (sections 1261, 1262,) was founded on the decisions of New York as they existed when the report was submitted; and a reference to the doctrine of these decisions, as well as the rules of the early common law, which they are claimed to have followed, will serve to aid in the construction of the section in question.

The rules of the common law are simple and well defined. The carrier was always liable for all losses, except those occasioned by the act of God or the public enemy. He was an insurer of the property committed to his custody, even against fire and theft, or robbery by armed men. This was on grounds of public policy, to prevent conspiracy of the carrier with the thief or trespasser. *HOLT, C. J., in Coggs v. Bernard, 2 Ld. Raym. 918, says: "This is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they be safe in their ways of dealing."* Lord MANSFIELD says (*Forward v. Pittard, 1 Term R. 27*), the carrier was held liable for such loss "to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled. The law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man; as storms, lightning, and tempests. * * * It appears from all the cases for a hundred years back that there are events for which the carrier is liable, independent of his contract. By the nature of his contract, he is liable for

all due care and diligence, and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm; that is, by the *common law*, a carrier is in the nature of an *insurer*." BURROUGH, J., in *Smith v. Horne*, 8 Taunt. 144, says: "The doctrine of notice was never known until the case of *Forward v. Pittard*," *supra*, from which we quote the language of Lord MANSFIELD, which he says he argued many years before. An examination of that case fails to show any such limitation, or to make any reference to the subject of notice. The doctrine seems first to have been recognized that the liability of the carrier could be limited by a special contract and notice brought home to the party in 1804, (*Nicholson v. Willan*, 5 East, 507,) by Lord ELLENBOROUGH, though the doctrine was expressly denied by Lord KENYON in 1793, in *Hide v. Proprietors*, 1 Esp. 36, in which he says: "Where a man is bound to any duty, and chargeable to a certain extent *by the operation of law*, in such case he cannot, *by any act of his own*, discharge himself." And, again, referring to the common carrier, he says: "They cannot discharge themselves by any act of their own, as by giving notice, for example, to that effect." The doctrine, however, announced by Lord ELLENBOROUGH in *Nicholson v. Willan*, *supra*, seems to have subsequently obtained, and to have been carried so far as to allow the common carrier to cast off all liability whatsoever. And in *Maving v. Todd*, 1 Starkie, 72, (1816,) the defendant carrier having given notice that "he would not be responsible for loss by fire," Lord ELLENBOROUGH nonsuited the plaintiff; remarking, however, that, "if this action had been brought twenty years ago, the defendant would have been liable, since by the common law a carrier is liable in all cases except two,—where the loss is occasioned by the act of God, or the king's enemies, using an overwhelming force which persons with ordinary means of resistance cannot guard against,"—thus showing the departure that the courts had made in so short a period. In 1830, the statute of 1 Wm. IV. c. 68, among other things enacted: "No public notice or declaration heretofore made, or hereafter to be

made, shall be deemed or construed to limit, or in any wise affect, the liability at common law of any carriers, but that all and every such carrier shall be liable as at common law to answer for the loss or injury of the property, any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding."

It would seem, then, that the common law of England, as it existed up to the time of our Revolution, did not permit a carrier to limit his liability by notice. Judge BRONSON in *Hollister v. Nowlen*, 19 Wend. 234-242, after reviewing the common-law decisions, and referring to the innovation made by Lord ELLENBOROUGH upon the doctrine of notice, says: "The doctrine [referring to the decision of Lord ELLENBOROUGH, *supra*] in question was not received in Westminster Hall without much doubt; and, although it ultimately obtained something like a firm footing, many of the English judges have expressed their regret that it was ever sanctioned by the courts. Departing, as it did, from the simplicity and certainty of the common-law rule, it proved one of the most fruitful sources of legal controversy which has existed in modern times. When it was once settled that a carrier might restrict his liability by a notice brought home to his employer, a multitude of questions sprung up in the courts which no human foresight could have anticipated. Each carrier adopted such a form of notice as he thought best calculated to shield himself from responsibility without the loss of employment, and the legal effect of each particular form of notice could only be settled by judicial decision. Whether one who had given notice that he would not be answerable for goods beyond a certain value, unless specially entered and paid for, was liable in case of loss to the extent of the value mentioned in the notice, or was discharged altogether; whether, notwithstanding the notice, he was liable for a loss by negligence, and, if so, what degree of negligence would charge him; what should be sufficient evidence that the notice came to the knowledge of the employer; whether it should be left to the jury to presume that he saw it in a newspaper which he was accustomed to read, or observed

it posted up in the office where the carrier transacted his business; and, then, whether it was painted in large or small letters, and whether the owner went himself or sent his servant with the goods, and whether the servant could read,—these, and many other questions, were debated in the courts, while the public suffered an almost incalculable injury in consequence of the doubt and uncertainty which hung over this important branch of the law. 1 Bell, Comm. 474. After years of litigation, parliament interfered, in 1830, and relieved both the courts and the public, by substantially reasserting the rule of the common law. * * * If, after a trial of thirty years, the people of Great Britain, whose interests and pursuits are not very dissimilar to our own, have condemned the whole doctrine of limiting the carrier's liability by a notice; if after a long course of legal controversy they have retraced their steps, and returned to the simplicity and certainty of the common-law rule,—we surely ought to profit by their experience, and should hesitate long before we sanction a practice which not only leads to doubt and uncertainty concerning the rights and duties of the parties, but which encourages negligence, and opens a wide door to fraud." The question in *Hollister v. Nowlen*, from which this quotation is made, was one of notice,—whether the carrier by general notice could limit his liability for the luggage of the passenger; and in discussing this question of notice the learned judge further uses the following pertinent language: "The argument is that where a party delivers goods to be carried, after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a me-

chanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise." And referring to the common law he says: "The doctrine that a carrier may limit his responsibility by a notice was wholly unknown to the common law at the time of our Revolution. It has never been received in this, nor, so far as I have observed, in any of the other states." Id. 248.

This subject received also, at the same time, a very careful consideration in *Cole v. Goodwin*, 19 Wend. 251, in which the carrier sought to avoid his liability for a trunk of the passenger by notice brought home to him that "all baggage is at the risk of the owner." Judge COWEN, after a very elaborate review of all the common-law decisions, announced his conclusion as follows: "I therefore think the defendants in the case at bar must take the consequence of their obligation as common carriers, notwithstanding the notice to the plaintiff. Admitting that the plaintiff acceded in the clearest manner to the proposition in the notice that his baggage should be carried on the terms mentioned, I think the contract thus made was void on his part, as contrary to the plainest principles of public policy. In thus holding, we follow the law as it is expressly admitted by the English judges to have stood at the period when our ancestors declared themselves independent; and, while we thus fulfill our constitutional duty, we are not, like Westminster Hall, obliged to lament while we enforce the law."

The doctrine of these cases was extended in *Gould v. Hill*, 2 Hill, 623, in which a majority of the court held that "common carriers cannot limit their liability or evade the consequences of a breach of their legal duties, as such, by an express agreement or special acceptance of the goods to be transported." But the court of appeals in *Dorr v. Navigation Co.*, 11 N. Y. 485, affirming the doctrine of *Hollister v. Nowlen*, and *Cole v.*

Goodwin, supra, denies the doctrine of *Gould v. Hill, supra*, and says: "That a common carrier may, by express contract, restrict his common-law liability, is now, I think a well-established rule of law;" citing English and American cases. The case of *Dorr v. Navigation Co., supra*, was one of carriage of merchandise, in which the carrier sought, by notice contained in the bill of lading, to limit its liability as to fire, accidents, etc., holding itself liable only "for ordinary care and diligence." In *Bissell v. Railway Co.*, 25 N. Y. 442, this doctrine was extended to allow the carrier to contract with a passenger to take upon himself the risk of damage from the negligence of the agents and servants of the carrier. The case, was, however, decided by a majority of the court only; Chief Justice DENIO, with whom were Judges WRIGHT and SUTHERLAND, making a vigorous dissent. In *Navigation Co. v. Bank*, 6 How. 378, the supreme court of the United States held that a provision in a bill of lading, stipulating "that the carriers are not to be responsible in any event for loss or damage," does not exonerate them from want of ordinary care. And in *Express Co. v. Caldwell*, 21 Wall. 266, in which a company provided in its receipt that it would not be liable for loss on any package, etc., delivered to it, unless claim should be made within 90 days, the supreme court held that such contract was valid; and in an elaborate opinion Justice STRONG, referring to "the conflict existing in modern decisions," as to how far the carrier may by contract limit his common-law liability, says: "All the modern authorities concur in holding that, to a certain extent, the extreme liability exacted by the common law originally may be limited by express contract. The difficulty is in determining to what extent, and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation without a clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained the court must be able to see that it is not unreasonable. * * * Hence, as we have said,

it is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy. This subject has been so fully considered of late in this court that it is needless to review the authorities at large. In *York Co. v. Railroad Co.*, 3 Wall. 107, it is ruled that the common-law liability of a common carrier may be limited and qualified by special contract with the owner, provided such special contract do not attempt to cover losses by negligence or misconduct. And in a still later case, (*Railroad Co. v. Lockwood*, 17 Wall. 357,) where the decisions are extensively reviewed, the same doctrine is asserted. The latter case, it is true, involved mainly an inquiry into the reasonableness of an exception stipulated for, but it unequivocally accepted the rule asserted in the first-mentioned case. The question, then, which is presented to us by this record, is whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy." In Pennsylvania, the right of the carrier to limit his liability by special acceptance is well established. *Atwood v. Reliance Co.*, 9 Watts, 87; *Bingham v. Rogers*, 6 Watts & S. 495; *Laing v. Colder*, 8 Pa. St. 479.

The decisions of the different states, as will be seen without further reference, are by no means harmonious; and it affords a strong argument in favor of the propriety of settling the conflicting decisions by statute, as has been done in this territory. The decisions of the courts have varied, and are now conflicting, as to whether the common-law liability of the carrier may be limited (1) by notice brought home to the party; (2) by special acceptance of goods for carriage; (3) by express contract between the parties. There is much diversity of opinion of the courts how far such liability may be restricted or limited on grounds of public policy. Our statute has aimed to settle these conflicting decisions. Sections 1261, 1262, Civil Code, read as follows: "Sec. 1261. The obligations of a common carrier can-

not be limited by general notice on his part, but may be limited by special contract." "Sec. 1262. A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for a gross negligence, fraud, or willful wrong, of himself or his servants." Section 1263, *supra*, supplements and makes clear section 1261. Section 1261 is founded upon the common-law doctrine as announced by Justices BRANSON and COWAN in *Hollister v. Nowlen*, and *Cole v. Goodwin*, 19 Wend. *supra*, and denies the right of a common carrier to limit his liability by a general notice. It adopts the decision of *Dorr v. Navigation Co.*, *supra*, in so far as it promulgates the rule of allowing the carrier to limit his liability by special contract; but it limits and qualifies that case in so far as it applies to a case of bill of lading accepted by the shipper, by providing in section 1263 that the shipper who does not sign the bill of lading or contract of carriage consents only by accepting it to the rates of hire, time, place and manner of delivery. If the carrier desires him to assent to any modification of his common-law liabilities contained in such instrument beyond this, he must require it to be signed by the shipper; in other words, passenger tickets, bills of lading, and written contracts for carriage are not "special contracts," within the meaning of section 1261, that can limit the obligations of the common carrier, unless they are signed by the passenger, consignor, or consignee. These two sections prescribe the manner in which the liability of the common carrier may be limited, and section 1262 prescribes the extent to which that liability may be limited. It limits the right of parties in advance of carriage to agree to exonerate from liability for gross negligence, fraud, or willful wrong of the carrier or his servants. All contracts to relieve from gross negligence, fraud, or willful wrong, on the part of the carrier or his servants, are by the terms of this statute expressly prohibited. The object of this section is obvious. They settle for this territory the conflicting decisions of the common law. They make unnecessary any discussion of the better rule, worked out by the learned decisions, to meet a fancied necessity for modifica-

tion of that laid down by the older cases. This legislation has settled the conflict, and adopted a rule while somewhat variant, yet much in harmony with the later and better decisions of the courts. Applied to this case, the receipt relied upon by defendant did not have the signature of plaintiff or consignor. It was therefore not a "special contract," which could limit the carrier's liability; it was a mere notice, which would not limit his obligation. His obligation was to deliver the trunk to the consignee named in the contract. He contracted to do so under his general obligation as a common carrier, and that he would be liable for the loss or injury thereof, except from "(1) an inherent defect, vice, or weakness, or a spontaneous action, of the property itself; (2) the act of a public enemy of the United States, or of this territory; (3) the act of the law; or (4) any irresistible superhuman cause." Section 1275, Civil Code.

He did not modify this contract in any manner provided by statute, and he must be held to his liability as such common carrier. Under this statute, parties can only relieve themselves from their obligations as common carriers in the manner therein pointed out. There is another provision of our statute, to which our attention has been called, which perhaps should receive some consideration by the court in the determination of this case. Section 958 of the Civil Code reads as follows: "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void." The first part of the section contains nothing new, and is substantially the common-law doctrine as pretty uniformly announced by the decisions of all the courts; but the latter clause, which declares unlawful every stipulation or condition in a contract, "which limits the time within which the party may enforce his rights," is perhaps against the great weight of modern authority. The question has been much mooted, and it has been vigorously contended that the law alone should establish limitations of actions. This view was urged

upon the attention of the court by no less distinguished counsel than Benjamin F. Butler, in *Fullan v. Insurance Co.*, 7 Gray, 61; but the court then denied the doctrine, and asserted that the opposite view had so long obtained there as to become the settled law of the state. And the same view is held in *Brown v. Insurance Co.*, 5 R. I. 394; *Insurance Co. v. Candle Co.*, 31 Pa. St. 448; *Wilson v. Insurance Co.*, 27 Vt. 99; *Ames v. Insurance Co.*, 14 N. Y. 266. It is claimed that the earlier decisions of New York took the other view, which was adopted by the commissioners; but the later view in New York and other states seems to be adopted by the supreme court of the United States in *Express Co. v. Caldwell*, 21 Wall. 264, cited *supra*. There are, however, very respectable authorities which announce the rule laid down by our statute, and the earlier decisions of New York, among which are *Insurance Co. v. Insurance Co.*, 9 Ind. 443; *French v. Insurance Co.*, 5 McLean, 461.

But it is not worth the while of the court to compare the reasoning of the respective courts, or to determine which is the better adapted to our locality. Our legislature has seen fit to settle the conflict, and its decision is as much binding upon us when it determines the conflict against, as well as when it determines it in favor of, the weight of authority as announced by the courts.

The language of the statute confines its prohibition of limitation to enforcement of rights, and is especially intended to cut off all limitations of time for commencement of actions. The provision of this receipt is perhaps rather a condition precedent than a limitation, and, as it is not necessary to this case to determine whether the limitation in this receipt comes within the prohibition of this statute, we shall leave this question for adjudication by the court whenever it shall be fully presented in a case involving this precise point.

In the view we have taken of this case, the defendant has nothing to complain of in the charge of the court. It was more liberal than he was entitled to under the statute, as we have construed it, and it will be unnecessary for us to examine

whether, under the evidence, there was a substantial compliance with the terms of the receipt or contract of carriage, as to the claim within 90 days, since it was not assented to by her signature, nor binding upon the plaintiff. The judgment of the district court is affirmed. All the justices concur.

SUESSENBACH *et al.*, Appellants, v. FIRST NAT. BANK, Respondent.

1. Mines and Mining—Claims—Property before Patent.

Where all of the laws, rules, regulations and customs with reference to a mining claim have been complied with, a property right, prior to the issuance of the patent, has been acquired that can be transferred or inherited.

2. Same—Trust.

Where the appellants, grantees of such a claim, (their grant being subject to that of respondent's as to a part, of which it or its grantors had held continuous possession,) acquired a patent to the entire claim, founded on the original location, there being no adverse claim by respondent, *held*, the appellants took the respondent's interest, charged with a trust that the court would enforce in an action brought by appellants to recover possession of the part held by the respondent.

3. Same—Adverse Claim.

Respondent's interest was not such an adverse claim within the meaning of sections 2325, 2326, Rev. St. U. S., as would require a protest of the appellants' application for a patent.

4. Pleadings—Ejectment—Equitable Defense.

Under the Code, equitable defenses may be interposed to an action of ejectment. It is also proper to dispose of such defenses first, and, if they are found in favor of the defendant, to discharge a jury from any consideration of the case.

5. Same—Evidence.

In such an action, on an issue of the equitable ownership of a mining claim, the admission in evidence of the rules of the mining district, and also the proceedings had in the land-office where the application to enter the claim was made, is proper as showing that by accident or fraud the legal title has not passed to the true owner.

(Argued October 8, 1888; affirmed October 18; opinion filed February 4, 1889.)

Appeal from district court of Lawrence county; HON. CHARLES M. THOMAS, Judge.

McLaughlin & Steele, for appellants.

That the court erred in admitting in evidence the proceedings had in the land-office, and admitting the rules and regulations of the mining district, see *Silver Mining Co. v. Brown*, 10 Sawy. 246; *Smelting Co. v. Kemp*, 104 U. S. 640, 641; *Steele v. Smelting Co.*, 106 U. S. 450-455; *Quinby v. Conlan*, 104 U. S. 420; *Tilton v. Cofield*, 93 U. S. 163; *Uligh v. Garrison*, 2 Dak. 71, 2 N. W. Rep. 99; *French v. Lancaster*, 2 Dak. 346, 9 N. W. Rep. 716; *Golden Terra M. Co. v. Smith*, 2 Dak. 462, 11 N. W. Rep. 97; *Kendall v. San Juan Silver M. Co.*, 9 Colo. 349, 12 Pac. Rep. 198; *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 324; *North Noonday M'g Co. v. Orient M'g Co.*, 6 Sawy. 299; *Jupiter Mining Co. v. Bodie Con. M. Co.*, 7 Sawy. 112; section 2119, Civil Code.

Any interest, legal or equitable, constitutes an adverse claim. *Hamilton v. Southern Nev. G. & S. M. Co.*, 33 Fed. Rep. 562; *Butte City Smoke-House Lode Cases*, 12 Pac. Rep. 858; *Richmond M. Co. v. Rose*, 114 U. S. 576-584, 5 Sup. Ct. Rep. 1055; *Lee v. Stahl*, 11 Pac. Rep. 77.

There are no less than nine distinct allegations in the defendant's answer that its claim of title and that of its grantors, Stebbins and Hoffman, is a title adverse to the plaintiffs and their grantors.

The grantor of the defendant neglected to file with the register and receiver of the land-office at Deadwood, during the period of publication, an adverse claim to the lot in controversy. This was a waiver of any claim that he had, legal or equitable, against the applicants, for the lot in question. The answer fails to allege in any of its defenses or counter-claims that such an adverse claim as the law makes obligatory was filed with the land-officers at any time, or that any action was commenced by Stebbins or the defendant to determine the right of possession to the premises in dispute, within the time and in the manner provided

by the United States law relating to mineral lands; and both he and the defendant were thereafter concluded from disputing plaintiffs' right to recover possession of the disputed premises. Rev. St. §§ 2325, 2326.

The policy of the mining act to compel parties to settle or litigate their disputes relative to adverse claims to mining ground before entry and payment is made manifest by the subsequent portion of section 2326. No similar proceedings are known to any of the other land laws. As the United States supreme court say in *Mining Co. v. Consolidated Mining Co.*, 112 U. S. 167: "The system of law adopted for the sale and regulation of its mineral lands is 'totally different' from that which governs other public lands." See, also, *Meyendorf v. Frohner*, 3 Mont. 322; *Eureka Cons. Co. v. Richmond Cons. Co.*, 4 Sawy. 318; 12 Nev. 320-323; *Smelting Co. v. Kemp*, 104 U. S. 636-655; *Steele v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Talbot v. King*, 9 Pac. Rep. 438; *Raunheim v. Dahl*, Id. 892; *Montana Copper Co. v. Dahl*, Id. 894; *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110; *Wolverton v. Nichols*, 119 U. S. 485, 7 Sup. Ct. Rep. 289; *Nessler v. Bigelow*, 60 Cal. 101.

From the foregoing decisions, whatever were the rights and equities of Stebbins in the lot in controversy in July, 1878, he waived them by not filing his adverse claim, if he had any, with the register and receiver of the Deadwood land-office within the 60-days period of publication of the application for the patent for placer claim No. 15.

When a statute confers a right, and prescribes adequate means of protecting it, the proprietor of that right is confined to the statutory remedy. *Almy v. Harris*, 5 Johns. 175; *McCowan v. Coherty*, 3 Wend. 494; *Stafford v. Ingersoll*, 3 Hill, 38; *Dudley v. Mayhew*, 3 N. Y. 15; *Cosfield v. McClellan*, 1 Colo. 374; *City of Denon v. Kent*, Id. 344; *Denning v. Smith*, 3 Johns. Ch. 345.

"Courts of equity do not assist those whose condition is attributable only to want of due diligence, nor lend their aid to par-

ties who, having had a plain, adequate, and complete remedy at law, have purposely omitted to avail themselves of it." *Hendrickson v. Hinckley*, 17 How. 604.

This was a legal action, triable by a jury. The issue between the applicant for a patent and the adverse claimant is necessarily narrowed down to the one question, who is entitled to the possession of the premises in controversy? Act of Congress, 1881, (Statutes at Large 1881, p. 565,) amendatory of section 2325; *Burke v. McDonald*, 13 Pac. Rep. 351; *Quimby v. Conlan*, 104 U. S. 420; *Estrada v. Murphy*, 19 Cal. 248; *Webber v. Marshall*, Id. 447; *Clark v. Huber*, 25 Cal. 597; *Lestrade v. Barth*, 19 Cal. 600; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. Rep. 18; *Killian v. Ebinghaus*, 110 U. S. 572, 4 Sup. Ct. Rep. 232; *Bradstreet v. Huntington*, 5 Pet. 408.

This is strictly a legal action, and the neglect of the defendant and its grantor to adverse the application for patent did not convert it into an equitable one.

"It is a rudimental principle in equity," says Chief Justice Gibson, "that he who purchases an imperfect title must stand or fall by the case of his vendor; and this rule has never been shaken." *Kramer v. Arthurs*, 7 Pa. St. 170; *Sergeant v. Ingersoll*, Id. 345; *Stewart v. Granley*, 18 Pac. Rep. 621. "A deed is to be tested by making reference to the authority recited in it for making the sale." *Moore v. Brown*, 11 How. U. S. 414; 2 Kent, 484, 485; *Denning v. Smith*, 8 Johns. Ch. 332. "But a quitclaim deed does not pass more title than the grantor has, and does not give the one who claims under it the rights of a bona fide purchaser, without notice." 3 Washb. Real Prop. 356; *May v. Le Claire*, 11 Wall. 232; *Touckard v. Crow*, 29 Cal. 161; *Miller v. Boggs*, 25 Cal. 187; *Thorpe v. Keokuk Canal Co.*, 48 N. Y. 253; *Gress v. Evans*, 1 Dak. 400; *Morrison v. Wilson*, 30 Cal. 344; *Cadiz v. Majors*, 33 Cal. 289; *Barrett v. Bridge*, 50 Cal. 658. "Covenants in a deed are only co-extensive with the grant." Rawle, 198, 199, 415; Herman, Estoppel, § 289; *Brown v. Jackson*, 3 Wheat. 452; *Kimball v. Semple*, 25 Cal. 452; *Cadiz v. Majors*, 33 Cal. 288.

The defendant has no equity. The occupation of mineral land as and for the purpose of a town lot is of no effect as against a valid mining claim location, and no rights or equities flow therefrom. The statutes expressly forbid the acquisition of title by virtue of such occupation. *Talbot v. King*, 9 Pac. Rep. 437; *Butte City Smoke-House Lode Cases*, 12 Pac. Rep. 859; *Meyendorf v. Frohner*, 3 Mont. 322; *Hawke v. Deffebach*, 22 N. W. Rep. 480; *Pierce v. Sparks*, Id. 491, 115 U. S. 400-411, 11 Pac. Rep. 78; *Richmond Mining Company v. Rose*, 114 U. S. 584, 585, 5 Sup. Ct. Rep. 1055; *Eureka Case*, 4 Sawy. 318.

To charge the holder of the legal title to land under a patent of the United States as trustee for another, it must appear that by the law properly administered in the land department the title should have been awarded to the latter. It is not sufficient to show that there was error in adjudging the title to the patentee. *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. Rep. 782; *Boggs v. Merced Mining Co.*, 14 Cal. 864, 365; *Nessler v. Bigelow*, 60 Cal. 101, 102; *Aurrechoechea v. Sinclair*, Id. 545-549; *Drew v. Valentine*, 18 Fed. Rep. 712; *Stark v. Siarr*, 6 Wall. 418; *Simmons v. Ogle*, 105 U. S. 277, 278.

The occupation of the defendant is worthless when opposed to the federal title. *Couchaine v. Bullion Mining Co.*, 4 Nev. 818, 819. See, also, *Gardner v. Miller*, 47 Cal. 370; *Oaksmith v. Johnston*, 92 U. S. 347, 3 Washb. 331; *Frisbie v. Whitney*, 9 Wall. 187; *Yosemite Valley Case*, 15 Wall. 77; *Shepley v. Cowan*, 91 U. S. 330.

At the time of the application for the patent respondent was not in a position to demand title to the premises from the government. No right is derived from purchasing the claim of a prior settler, unless he has, by an actual entry at the proper land-office, acquired a transferable interest in the land. *Quinby v. Conlan*, 104 U. S. 420; *Hutton v. Frisbie*, 37 Cal. 490-495; *Whitney v. Frisbie*, 9 Wall. 187; *People v. Shearir*, 30 Cal. 648; *Doll v. Meador*, 16 Cal. 326; *Manning v. San Jacinto Tin Co.*, 7 Sawy. 426.

Right of possession is not an interest in the soil. Section 2322, Rev. St.; *Chapman v. Toy Long*, 4 Sawy. 34-35; *Forbes v. Grocey*, 94 U. S. 766; *Table Mt. Tunnel Co. v. Stranahan*, 20 Cal. 209; *Mining Co. v. Taylor*, 100 U. S. 42; *Belk v. Meagher*, 104 U. S. 283.

The plaintiffs are not trustees for the defendant. There is no privity between them. They are also strangers to each other's title, claiming the premises in question by reason of adverse claims of title. See sections 921, 279, and 293, Civil Code; Big. Estop. 294-302; *Blight's Lessees v. Rochester*, 7 Wheat. 335; *Society v. Town of Paulet*, 4 Pet. 406; *Watkins v. Holman*, 16 Pet. 53; *Osterhaut v. Shoemaker*, 3 Hill, 518; *Averill v. Wilson*, 4 Barb. 180, 185; Herm. Estop. §§ 263, 266, 270, 2823. Rawle, Cov. 454; *Robertson v. Pickereil*, 109 U. S. 613, 4 Sup. Ct. Rep. 407; *Collins v. Bartlett*, 44 Cal. 380; *Walkins v. Holman*, 16 Pet. 25; *San Francisco v. Lawton*, 18 Cal. 465; *Sparrow v. Kingman*, 1 N. Y. 242; *Willison v. Watkins*, 3 Pet. 43; *Jackson v. Huntington*, 5 Pet. 402; *Voorhees v. White's Heirs*, 2 A. K. Marsh. 27; *Winlock v. Hardy*, 4 Lit. 474.

There could be no trust under the provisions of section 279, C. C.

But we go further, and maintain that no trust can be created in the mineral lands of the United States by a locator that can affect or burden the title of the United States, or attach to it by reason of any adverse claim made by a third party. See *Warren v. Van Brunt*, 19 Wall. 646.

G. C. Moody and *Edwin Van Cise*, for respondent.

The mining claim of which the lot in controversy is a part was located by the defendant bank's "grantors." At the time of the grant to the defendant said mining claim was a valid, complete, and subsisting mining location, and has continued ever since to be a valid location, without break in the title or in the right to possession. Whatever rights the plaintiffs' grantors, the patentees, acquired, was under and by virtue of such location. Such location amounted to a grant by the govern-

ment to the locators of the exclusive right of possession, together with the right to acquire title from the government so long as they continued to comply with the laws of congress, and with the local laws, rules, and regulations governing such locations. They had the power and authority to convey and assign such property, and such right to purchase and complete the title in part to Stebbins and Hoffman and in part to their other transferees; and said Stebbins and Hoffman transferred to the defendant such property and right of possession in this part of the claim, together with the right to obtain from the government the full title to said disputed premises by patent under and by virtue of the location which they, the locators, had made. The government held the title, after said location was complete, in trust for the locators and their transferees. *Belke v. Meagher*, 3 Mont. 65, 78, 79; *Belke v. Meagher*, 104 U. S. 279, 283; *Noyes v. Mantle*, 8 Sup. Ct. Rep. 1133, 5 Pac. Rep. 856, 861, 862; *Ferguson v. Neville*, 61 Cal. 356-358; *Hopkins v. Noyes*, 2 Pac. Rep. 280; *Silver Bow M. & M. Co. v. Clark*, 5 Pac. Rep. 570, 576; *Blake v. Mining Co.*, 2 Utah, 54, 57; *Forbes v. Gracey*, 94 U. S. 762, 767; *Meyendorf v. Frohner*, 3 Mont. 342, 343; *Renshaw v. Switzer*, 13 Pac. Rep. 127, 128.

The conveyances made by the locators to Stebbins and Hoffman amounted to a contract for the purchase by them of this part of the claim. They could lawfully transfer the same to this defendant. The locators and their grantees were bound when they obtained the title to the entire claim to convey to Stebbins and Hoffman while they held it, or to this defendant while it held this contract, the full and complete title which was obtained by the patent.

Stebbins and Hoffman having paid the locators the full purchase price, and having been admitted into possession by them, and F. T. Sutherland, Lake, and J. J. Sutherland having agreed to make good the conveyance of the locators, and to protect Stebbins and Hoffman and their transferees in the possession and right to the possession of the premises, they, the said Sutherland, Lake, and Sutherland, were bound by that agreement.

In the absence of any agreement by them, they were bound by these conveyances to Stebbins and Hoffman. So, also, were their grantees and all parties claiming under them having full notice of the agreement or of the right under which Stebbins and Hoffman and this defendant held the possession. Possession was notice.

Thereafter, when Sutherland, McCaffery, Suessenbach, and the heirs of Edward Welch took the title to this part by patent, they acquired it in trust for, and should be compelled to convey it to, the defendant.

If a trust exists at the time of the issuance of the patent, a court of equity will control the operation of the legal title for the benefit of the *cestui que trust*. *O'Connor v. Irwin*, 16 Pac. Rep. 236, 237; *Bludworth v. Lake*, 33 Cal. 263; *Alexander v. Sherman*, 16 Pac. Rep. 45; *Blake v. Thom*, Id. 270; *Philes v. Hickies*, 18 Pac. Rep. 595, 596; *Gilbert v. Sleeper*, 12 Pac. Rep. 172; *Rector v. Gibson*, 111 U. S. 276, 4 Sup. Ct. Rep. 605; *Marquez v. Frisbe*, 101 U. S. 478; *Moore v. Robbins*, 96 U. S. 530; *Kimball v. McIntyre*, 1 Pac. Rep. 167; *Baker v. Woodward*, 6 Pac. Rep. 173; *Lakin v. Mining Co.*, 25 Fed Rep. 337; Civil Code, § 1297; *Peasley v. McFadden*, 10 Pac. Rep. 179; *Fideler v. Norton*, 30 N. W. Rep. 128.

The claim which respondent makes is not an adverse claim within the meaning of the law of congress. It claims under the same location and grant. It does not claim by virtue of any adverse location. If the defendant's grantors had undertaken to file a protest and bring an adverse suit, they would have necessarily alleged and proven the same identical facts with reference to the location by Noah Siever and his associates as gave the right to plaintiffs to have this patent issued. It is not contemplated that an owner in and under the same location shall protest against the issuance of a patent for said location, or for any portion thereof. He is interested to have the patent issued. One who protests and brings an adverse suit alleges necessarily the existence of another and adverse location, covering the same or a portion of the same ground.

Supposing Siever and his co-locators who conveyed to Stebbins had proceeded to and had applied for and obtained a patent to this placer claim, would any one contend they were not bound by these conveyances to Stebbins? Are their grantees with full notice of all the rights and equities in any stronger positions? Civil Code, § 1297; *Doherty v. Morris*, 16 Pac. Rep. 911; *Peasley v. McFadden*, 10 Pac. Rep. 179; *O'Conner v. Irwin*, 16 Pac. Rep. 236, 237; *Blake v. Mining Co.*, 2 Utah, 54; Rev. St. U. S. § 2332.

It has never been held, so far as we are aware, that it was necessary for co-owners of the same location, or parties claiming under the same location, to adverse the application for a patent to such location; at least, unless one of the co-tenants or co-owners had been excluded from the possession by the other co-owners,—not this case, for this defendant's grantors, and it, up to the commencement of this action, remained in undisputed, peaceable possession. *Week's Mineral Land*, § 128.

The amended location certificate did not purport to be a relocation, but amended to more clearly define the boundaries. Again, such amended certificate does not supersede the original, and relates back to the first location. *Strepy v. Stark*, 5 Pac. Rep. 111; Dak. Rev. Code, p. 512, c. 31, § 13; *McEvoy v. Hyman*, 25 Fed. Rep. 596.

The plaintiffs, claiming title in their abstract and application under Siever and others, as does defendant Bank, are estopped from denying the validity of their grantor's title. *Blake v. Thom*, 16 Pac. Rep. 270; *Mining Co. v. Deferrari*, 62 Cal. 160.

The court's dispensing with the jury, and deciding the case on the equitable issues and counter-claims, is beyond question, and is supported by the unanimous decisions of the courts where similar practice prevails. *Onson v. Cown*, 22 Wis. 329; *Lombard v. Cowhan*, 34 Wis. 490, 492; Code Civil Proc. § 118; *Cavilli v. Allen*, 57 N. Y. 508, 514; *Bludworth v. Lake*, 33 Cal. 255; Pom. Rem. §§ 97, 737, 746, 764, 792; *Arguelo v. Adinger*, 10 Cal. 150, 160; *Estrada v. Murphy*, 19 Cal. 248, 272, 273; *Weber v. Marshall*, Id. 447, 457; *Lestrode v. Barth*, Id. 660, 671; *Du-*

Pont v. Davis, 35 Wis. 631, 639; *Ingles v. Patterson*, 36 Wis. 373, 376; *Bartlett v. Judd*, 21 N. Y. 200, 203; *Tabor v. Mackee*, 58 Ind. 290.

CARLAND, J. This action was brought in the district court of Lawrence county by the appellants to recover the possession of a parcel of land situate, lying, and being in the city of Deadwood, county of Lawrence, territory of Dakota, and more particularly described as follows: Commencing at the north-east corner of Main and Lee streets; thence running in a north-easterly direction along the line of said Main street 21.5 feet; thence at right angles to said Main street in a north-westerly direction 100 feet to place of beginning,—being lot No. 2, in block No. 3, and a part of mineral claim No. 86, as patented by the United States. The appellants deraigned their title from the United States through the usual mineral certificate or patent and several mesne conveyances from the original patentees and their grantees. The respondent, in order to defeat the claim of the appellants, set up by its answer several equitable defenses, and asked that the plaintiffs be declared by the judgment of the court to hold the premises hereinbefore described in trust for the respondent, and that, upon the payment of certain costs and expenses expended in obtaining the patent the plaintiffs be compelled to convey said premises to the respondent. As to the mode of procedure at the trial more will be said further on in this opinion. The court found that the equitable claim of the respondent was a valid one, and rendered judgment in accordance with the prayer of its answer. The court found the facts to be substantially as follows:

That on the 28th day of February, 1877, the land in controversy, and the land contiguous thereto and surrounding it, was a part of the unappropriated public domain of the United States, and was land valuable for minerals, and contained valuable mineral deposits, to-wit, gold, and what is known and called "placer ground;" and upon said day Noah Siever, Edward Durham, William Moore, and Thomas Clifton were citizens of the United

States, and had theretofore entered upon and explored the same, and discovered valuable mineral deposits therein, to-wit, gold; and on the 16th day of March, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton duly located, claimed, and appropriated the same as placer mining ground, the same being known and called "Placer Claim No. 15," above discovery, on Whitewood gulch, in Whitewood mining district, Lawrence county, Dak., in accordance with the customs, laws of the United States, the local laws, and the customs, rules, and regulations of miners in said mining district, by distinctly marking the surface boundaries of said claim so that they could be readily traced on the ground; by setting substantial stakes at each corner of said claim, and on the sides thereof, with the name of the claim marked thereon and the name of the locators; and by putting a plain sign or notice at the points of discovery thereon, containing the name of the claim as "Placer Claim No. 15," above discovery, and the names of the locators, to-wit, Noah Siever, Edward Durham, William Moore, and Thomas Clifton, and the date of location, to-wit, March 16, 1877; and by filing and recording a certificate of location in the records of the recorder of said Whitewood mining district. And said locators remained in continuous possession of said placer claim, working and developing the same, until their sale and transfer as hereinafter stated. That during the months of March and April, 1877, said Noah Siever and his said associates expended more than \$500 in value in labor and improvements in working and developing said placer claim No. 15; said placer claim No. 15 containing not to exceed four acres, and no more than was allowed by the local laws, rules, and regulations in force in said mining district. That on the 28th day of March, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being then the owners of and in actual possession of said placer claim No. 15 as aforesaid, claiming the same under the mineral land laws of the United States, for a valuable consideration made, executed, and delivered to William R. Stebbins and C. Hoffman, who were citizens of the United

States, their deeds of conveyance for a portion of said placer mining claim, described in said deed as lot No. 2 A, on Main street, in the town of Deadwood, county of Lawrence, and territory of Dakota, which are the same premises in controversy in this action, and then and there delivered possession of said premises to said Stebbins and Hoffman, which deed was afterwards filed for record in the register of deeds' office of Lawrence county on the 25th day of April, 1877, and recorded in Volume A, page 77, of the records of said office, and which deed was in the words and figures following:

"Noah Siever, Edward Durham, William Moore, and Thomas Clifton, of Deadwood, Lawrence county, territory of Dakota, agree with William R. Stebbins and C. Hoffman, of the same place, that in consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, the said Stebbins and Hoffman have full right to occupy and possess lot No. 2 A, on Main street, in the town of Deadwood, county and territory aforesaid; the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being the owners of placer claim No. 15, above discovery, in Whitewood mining district, county and territory aforesaid, hereby deeding and conveying to said Stebbins and Hoffman all their claim, right to possess, or title they may have by reason and virtue of said placer claim to said premises, excepting the right to mine for gold under said premises, and then such mining to be done after giving reasonable notice to said Stebbins and Hoffman, and all reasonable precautions to carry on said mining to be used to prevent damage and injury to said premises. In witness whereof we hereunto set our hands and seals. Done at Deadwood, Lawrence county, territory of Dakota, this 28th day of March, A. D. 1877.

"NOAH SIEVER. [L. S.]

"EDWARD DURHAM. [L. S.]

"WILLIAM MOORE. [L. S.]

"THOMAS CLIFTON. [L. S.]

"In presence of E. C. BREARLEY."

That prior to the execution of the conveyance last named said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, having agreed with owners of other placer claims immediately contiguous to said placer claim No. 15, to-wit, Nos. 13 and 14, laid out and platted a town or city upon their claims 13, 14, and 15, calling it "Deadwood," agreeing that the owners of each placer claim respectively should be the owners of the lots and blocks of said town or city, within the limits of such claim. That subsequently, by allotment and segregation, the said Noah Siever and Edward Durham became the sole claimants to lot No. 2 A, on Main street, in Deadwood, the premises now in controversy, and a part of said placer claim No. 15. That prior to the conveyance of March 28, 1877, hereinbefore referred to, from Siever, Durham, Moore, and Clifton, said Siever and Durham had employed James A. Hamilton and H. J. Scott to aid them in constructing a building on said lot No. 2 A, and for their aid had promised them an interest in said lot and in said building, and on the 27th day of March, 1877, the said Noah Siever, Edward Durham, James A. Hamilton, and H. J. Scott, for a valuable consideration, to-wit, \$3,000, then paid to them by said Stebbins and Hoffman, made, executed, and delivered to the said W. R. Stebbins and C. Hoffman a deed to said lot No. 2 A, the premises in controversy, which deed was duly acknowledged, and on the 20th day of April, 1877, was duly recorded in Book A of Deeds, pages 24, 25, in the office of the register of deeds for Lawrence county, and is in words and figures following, to-wit:

"This indenture, made the 27th day of March, A. D. 1877, between Noah Siever, Edward Durham, James A. Hamilton, and H. J. Scott, of Deadwood, Lawrence county, territory of Dakota, parties of the first part, and William R. Stebbins and C. Hoffman, of the same place, parties of the second part, witnesseth, the said parties of the first part, for and in consideration of the sum of three thousand dollars, to them in hand paid by the parties of the second part, the receipt whereof is hereby

acknowledged, have remised, released, and forever quitclaimed, and by these presents do remise, release, and forever quitclaim, unto the said parties of the second part, and to their heirs and assigns, all of the following described real estate, or landed claim or possessory right or property, situated and being in Deadwood, Lawrence county, territory of Dakota, to-wit, lot No. 2 A, as located by the parties of the first part, March 15, A. D. 1877, and recorded in Book B, page twenty-three, of the records of said Deadwood. The lot No. 2 A is more particularly described as being situated on Main street, in said Deadwood, having a frontage of twenty feet on Main street, and running back to the depth of one hundred feet. There is now upon said lot one two-story building, nearly completed, with a frontage of twenty feet and a depth of fifty feet. Together with all the rights, privileges, and franchises thereto incident, appendant, or appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in any wise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity; of the said parties of the first part, of, in, or to the said premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the said premises, and privileges thereto incident, unto the said parties of the second part, their heirs and assigns, forever. And the said Noah Siever, Edward Durham, James A. Hamilton, and H. J. Scott, for themselves and their assigns and representatives, do hereby covenant and agree that they have full right and power to deed and convey the said premises, and that this conveyance does convey to William R. Stebbins and C. Hoffman, parties of the second part, their heirs and assigns, the full possession, right of possession, and property in and to said lot No. 2 A, as against any individual, individuals, corporation, corporations, whomsoever or whatsoever, notwithstanding, forever. And the parties of the first part do further agree to sustain and defend the title and possession of the said par-

ties of the second part to the said premises as against any individual, individuals, corporation, or corporations. The said parties of the first part further agree that if any suit or suits be commenced against the said parties of the second part, involving the title to or the right of possession of the property herein conveyed, the said suit or suits will be defended and contested at the sole expense and cost of the parties of the first part, who hereby solemnly agree to keep said parties of the second part free and clear of any costs or damages that may occur by reason of any litigation in the premises.

"In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

"NOAH SIEVER. [L. s.]

"EDWARD DURHAM. [L. s.]

"JAMES A. HAMILTON. [L. s.]

"H. J. SCOTT. [L. s.]

"Signed, sealed, and delivered in the presence of

"E. C. BREARLEY.

"JOHN WOLZMUTH.

"CHRISTIAN FLUCKEN."

(Acknowledgment.)

That this building thus erected by Siever, Durham, Hamilton, and Scott was a two-story frame building, about 20 feet front on Main street, by 60 feet deep, and the possession thereof was delivered to said Stebbins and Hoffman April 21, 1877. That said building and lot was used as a bank by the banking firm of Stebbins, Wood & Post, and for offices used and rented by them, the said William R. Stebbins being a member of the firm of said Stebbins, Wood & Post. That on or about August 1, 1877, the said Hoffman conveyed his interest in the premises in controversy to said William R. Stebbins, which conveyance was duly recorded on or about said date. That said banking firm of Stebbins, Wood & Post continued to occupy and possess under said conveyance and delivery of possession the said prem-

ises until about July, 1878, when the respondent was organized as a national bank, under the laws of congress, and succeeded to the business of said Stebbins, Wood & Post, and immediately went into possession and control of the said premises in controversy, and by a deed dated the 10th day of August, 1878, and acknowledged on the 24th day of the same month, the said William R. Stebbins sold, transferred, and conveyed said property to the respondent, which deed was duly filed for record August 31, 1878, and duly recorded in Book 28, page 54, of the records of the register of deeds' office of said Lawrence county, and said respondent has continued in the possession of said disputed premises ever since the delivery of possession to it by the said Stebbins, Wood & Post, in July, 1878. That on or about June 26, 1877, the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, being in possession of said placer claim, and claiming to be the owners thereof, by virtue of the location heretofore stated, subject to the rights theretofore transferred by them to said Stebbins and Hoffman, for the consideration of \$1,600, sold to F. T. Sutherland, H. F. Lake, and J. J. Sutherland all their right, title, and interest in and to said placer claim No. 15, and gave to the said Sutherland, Lake, and Sutherland a bill of sale therefor, which was on said date filed in the office of the recorder of the mining district, who was then the said J. J. Sutherland. That at the time of the execution of this bill of sale said Noah Siever and his associates delivered to the said Sutherland, Lake, and Sutherland possession of that portion of said placer claim, the possession of which remained in them, but expressly reserved therefrom said lot No. 2 A, theretofore conveyed by them, as hereinbefore stated, to Stebbins and Hoffman, and of which said Stebbins and Hoffman were then in possession, and as a part of the consideration for the sale of said placer claim No. 15 to said Frank T. Sutherland, H. F. Lake, and J. J. Sutherland, Sutherland, Lake, and Sutherland agreed with said Noah Siever and his associates to protect and respect and defend the title and possession of said William R. Stebbins and C. Hoffman to that part of placer claim No. 15

described as said lot No. 2 A, on Main street, Deadwood, and to keep and make good to them or their heirs and assigns the covenants contained in the said deeds of Siever, Durham, Clifton, and Moore, and of Siever, Durham, Hamilton, and Scott, to the said Stebbins and Hoffman hereinbefore set forth. That on the 25th day of July, 1877, the said J. J. Sutherland sold his interest in placer claim No. 15 to F. T. Sutherland, and on the same day said F. T. Sutherland sold and conveyed such J. J. Sutherland interest to Edward Welch. That on January 5, 1878, H. F. Lake sold and conveyed his interest to Hugh McCaffrey and Henry Suessenbach, two of the plaintiffs herein. That on the 29th day of January, 1878, Edward Welch, Frank T. Sutherland, Hugh McCaffrey, and Henry Suessenbach filed in the office of the register of deeds of Lawrence county, and had recorded in Book B, Miscellaneous Records, of said office, at page 324, an instrument in words and figures following, to-wit, as an amended location certificate of said placer claim No. 15:

"Notice is hereby given that the undersigned, for the purpose of more clearly defining the boundaries of placer claim No. 15, above discovery, on Whitewood mining district, in Lawrence county, Dakota territory, do on this 28th day of January, 1878, file this, our amended certificate, and described more particularly as per survey of the annexed field-notes.

[Signed]

"EDWARD WELCH.

"FRANK T. SUTHERLAND.

"HUGH MCCAFFREY.

"HENRY SUESSENBACH."

Appended to this were field-notes by Henry Rholeder, surveyor, showing courses and distances, and describing the tract as containing three and forty-six one-hundredths acres. That on the 15th day of May, 1878, the said F. T. Sutherland, Hugh McCaffrey, Henry Suessenbach, and Edward Welch, by Frank Welch, administrator, the said Edward Welch having in the mean time died, filed in the United States land-office at Deadwood, D. T., an application for patent for said placer claim No.

15, above discovery. The application to enter was sworn to by said Frank T. Sutherland. In said application the said Sutherland, McCaffrey, Suessenbach, and Welch traced their title to and claimed said entry under and by virtue of said location of said placer claim, made the 16th day of March, 1877, by said Noah Siever, Edward Durham, William Moore, and Thomas Clifton heretofore stated, and claimed the right to make said entry and obtain title to said premises under and by virtue of said location, and there was appended to said application, as a part thereof, an abstract of title from the records of the Whitewood mining district, as follows:

"Abstract of Title—Claim No. 15.

"Claim No. 15, above discovery, was located January 16, A. D. 1876, by G. W. Wilkinson. See Book A, page 36. August 19, 1876, one-half interest relocated by Edward Durham, Noah Siever, Thomas Clifton, and William Moore. See Book A, page 69. March 22, 1876, contract to transfer for work to J. A. Hamilton, if filled. See Book A, page 99. July 11, 1876, bill of sale from W. A. Gamble and A. Stein to T. Clifton and W. Moore, one-half interest. See Book A, page 151. March 15, 1877, relocated by J. H. McCutcheon. See Book A, page 216. March 16, 1877, relocated by Noah Siever, E. Durham, Thomas Clifton, and William Moore. See page 216. June 26, 1877, bill of sale from Noah Siever, E. Durham, Thomas Clifton, and William Moore to F. T. Sutherland, Henry Lake, and J. J. Sutherland. See page 257. July 25, 1877, bill of sale for one-third interest from J. J. Sutherland to F. T. Sutherland."

From the office of the register of deeds the following:

"Abstract of Title—Placer Claim No. 15, above discovery, Whitewood Placer Mining District, Lawrence County, Dakota Territory.

"Edward Welch, Frank T. Sutherland, Hugh McCaffrey, and Henry Suessenbach, relocators. Certificate and survey dated

January 28, 1878; filed January 29, 1878; recorded in Book B, page 324. Amended location certificate with field-notes of survey attached. F. T. Sutherland to Edward Welch. Deeds dated July 25, 1877; acknowledged July 25, 1877; filed July 25, 1877; consideration, two thousand dollars; an undivided one-third interest. H. F. Lake to Hugh McCaffrey and Henry Suessenbach. Deed dated January 5, 1878; acknowledged January 5, 1878; filed January 17, 1878; recorded in Book F, page 152; consideration, one thousand dollars; an undivided one-third interest."

That thereafter such proceedings were had pursuant to said application for patent, as hereinbefore stated. That on July 16, 1878, an entry and purchase of said placer claim No. 15, above discovery, was made at said United States land-office at Deadwood, Dak., in the name of said F. T. Sutherland, Hugh McCaffrey, Henry Suessenbach, and Frank Welch, administrator of Edward Welch, said claim being designated in the entry and purchase as "mineral lot No. 86." Thereafter, pursuant to such entry and purchase, patent of the United States issued for said mineral lot No. 86 to said F. T. Sutherland, Hugh McCaffrey, Henry Suessenbach, and the heirs of Edward Welch, which patent bears date February 15, 1882, and was filed for record August 21, 1882, and recorded in Book No. 20, page 15, of the records of the register of deeds' office, in said Lawrence county, the said F. T. Sutherland, patentee, being the same F. T. Sutherland, one of the purchasers of said placer claim from Siever, Durham, Moore, and Clifton. That on the 16th day of July, 1878, said F. T. Sutherland sold and conveyed all his right, title, and interest in and to said placer claim No. 15 to Hugh McCaffrey and Henry Suessenbach, by deed of that date, filed for record July 21, 1882, and recorded in Book No. 20, page 428, of the records of said register of deeds' office. That on or about the 5th day of August, 1882, the heirs of Edward Welch, to-wit, Samuel Welch, Mary Welch, Lydia Welch, and Mary Franklin, sold and conveyed all their interest in said pla-

cer claim No. 15 to Henry Suessenbach, by deed of that date, filed for record August 5, 1882, and recorded in Book No. 26, page 75, of the records of said office. That on or about August 10, 1882, Henry Suessenbach and Hugh McCaffrey sold to Daniel McLaughlin and William R. Steele, by deed of that date, an undivided one-fourth interest in and to certain portions of said mineral lot No. 86, including the premises in dispute. That the ground claimed by the defendant under the chain of title set out in this statement of facts is identical with that described in the complaint and claimed by the plaintiffs as a part of mineral lot No. 86. That the defendant has occupied the said lot continuously since its organization in 1878, up to this time. That on September 26, 1879, the building thereon erected by the said Durham, Moore, Hamilton, and Scott, and sold with the lot to the said Stebbins and Hoffman, was destroyed by fire, and thereupon the defendant immediately re-erected on the same ground, and had finished and ready for occupancy, January, 1880, a two-story brick building, 21 by 70 feet, of the value of \$10,000, which since January 1, 1880, has been continuously occupied by the defendant as a bank and for offices. That at the time of each and every of the conveyances to the plaintiffs, they, the plaintiffs, had full notice and knowledge of the claim of title by the said Stebbins and Hoffman and by the defendant bank. That the respondent has been at all times ready and willing and is now ready and willing to pay its just and full proportion of all the expenses attending the procuring of the patent from the United States. That the title acquired by the plaintiffs, under the patent from the United States, came to them through the location of said placer claim No. 15, made by the said Noah Siever, Edward Durham, William Moore, and Thomas Clifton, March 16, 1877, no other location of said placer claim No. 15 having been made by the said plaintiffs or their grantors, or any of them.

The foregoing facts are sustained by the evidence, with the exception of the finding that Sutherland, Lake, and Sutherland agreed with Noah Siever and his associates to protect and respect

the title and possession of Stebbins and Hoffman. We are of the opinion, however, that it was not necessary for the trial court to find that there was such an agreement in order to sustain the judgment which it rendered. The appellants, at the argument, insisted upon four principal points for a reversal of the judgment: (1) That the respondent, or its grantors, never obtained any interest in the premises in controversy, for the reason that at the time of the alleged transfer by the original locators of placer claim No. 15, above discovery, the title to said land and premises was in the United States; (2) that, admitting that respondent, through its grantors, obtained an interest in said mining claim, the said interest had been lost by failure to adverse the claim of appellants' grantors when they applied through the United States land-office for a patent for said mining claim. (3) That the court erred in admitting in evidence the transcript of the proceedings had in the United States land-office when the appellants' grantors applied for a patent, and also in admitting in evidence the mining rules and regulations of Whitewood mining district; (4) that the court erred in discharging the jury from the case.

It is now believed to be the settled law that a mining claim, concerning which all the laws, rules, regulations, and customs governing the same have been complied with, is property, and capable of being transferred, mortgaged, and inherited. In *Forbes v. Gracey*, 94 U. S. 766, the validity of the law of the state of Nevada, providing for the taxation of mining claims, was in question. It was insisted against the validity of the law that it was an attempt by the state of Nevada to tax the property of the United States. Justice MILLER, in delivering the opinion of the court holding such a law valid, said: "In the latter, also, such right as the mining laws allow, and as congress concedes, to develop and work the mines, is property in the miner, and property of great value. That it is so is shown most clearly by the conduct of the mining corporation in whose interest this suit is brought, which, for the purpose of evading this tax, permits its investment in this mine, said to be worth

from fifty to a hundred millions of dollars, to rest on this claim, this mere possessory right, when it could, at a ridiculously small sum compared with the value of the mine, obtain the government's title to the entire land, soil, mineral, and all. These claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific coast states. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the states and the federal government. This claim may be sold, transferred, mortgaged, and inherited without infringing the title of the United States." See, also, *Belk v. Meagher*, 104 U. S. 279, where it is said that "a mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent." The language of the court in the case of *Noyes v. Mantle*, 127 U. S. 351, 8 Sup. Ct. Rep. 1132, is so applicable to this case and the point under consideration that we cannot do better than to quote therefrom. The court says: "Section 2322 of the Revised Statutes, re-enacting provisions of the act of congress of May 10, 1872, (17 St. 91,) declares that the locators of mining locations previously made, or which should thereafter be made, on any mineral vein, lode, or ledge on the public domain, their heirs and assigns, where no adverse claim existed on the 10th of May, 1872, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with those laws, governing their possessory title. There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak lode mining claim, or that the claim was ever abandoned or forfeited. They were the discoverers of the claim. They marked its boundaries by stakes, so that they could be readily traced. They posted the required notice, which was duly recorded in compliance with the regulations of the district. They had thus

done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for the locators or their vendees." It may be proper here to say that by section 2329, Rev. St. U. S., placer mining claims are subject to entry and patent under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims. That the mining location of Siever, Durham, Moore, and Clifton, on placer claim No. 15, was a valid one, is not disputed in the case at bar, nor could it be, except by the United States, for the reason that it was the location which resulted in the issuance of the patent through which both the appellants and respondent deraign their title. The certificate signed by Welch, Sutherland, McCaffrey, and Suessenbach, and filed in the office of the register of deeds of Lawrence county, on January 29, 1878, was not a relocation of placer claim No. 15, above discovery, but was, as its language imports, an amended certificate "for the purpose of more clearly defining the boundaries" of said claim. It will not do for the appellants to say that they claim under a patent of the United States, and not under the original location. If the United States, prior to the issuance of the patent for placer claim No. 15, held the legal title of said claim in trust for the original locators and their vendees, then the legal title to a portion of said mining claim was held in trust by the United States for the grantors of the respondent and their vendees. The entry at the United States land-office, and the patent issued in pursuance thereof, was burdened with this trust, and the same may be enforced against any person claiming under the patent who can be charged with notice of it. It is further objected that the respondent and its grantors, subsequent to the transfer of the premises in controversy from Siever, Duraham, Moore, and

Clifton, and Siever, Durham, Hamilton, and Scott, did not improve the premises in question, as required by the laws and customs regulating improvements on mining claims. This objection cannot be urged, as the respondent does not pretend that its rights rest upon the fact that it and its grantors have made the premises in controversy an independent mining claim, but that it is the owner of said placer claim No. 15 to the extent of the premises in controversy, and that the fact as to whether or not the laws, regulations, and customs were complied with in relation to placer claim No. 15, of which the premises in question were a part, has been settled by the issuance by the United States of a patent for said claim. We are therefore of the opinion that by the conveyances set forth in the findings, and the possession delivered thereunder Stebbins and Hoffman, and their vendee, the respondent, obtained an interest in said placer claim No. 15, above discovery, co-extensive with the premises in controversy, the legal title to which was held in trust by the United States for the benefit of the grantors of respondent and their vendees, and that, the appellants and their grantors having notice of the title and possession of respondent and its grantors, said trust may be enforced against them, providing there is no other legal impediment.

The point most strenuously urged at the argument, and which is insisted by appellants to be fatal to the rights of the respondent, if any existed, was the point that the respondent had lost its interest in placer claim No. 15, above discovery, by the failure of William R. Stebbins to file an adverse claim in the local United States land-office at the time that Sutherland, McCaffrey, Suessenbach, and Welch entered placer claim No. 15 for patent. Among the various requirements of the laws of the United States regulating the mode of entering a mineral claim is one which requires that a notice that the application has been made to enter the land shall be published for the period of 60 days in a newspaper, to be designated by the register of the land-office as being nearest such claim. The law also provides, (section 2325, Rev. St. U. S. :) "If no adverse claim shall have been filed with

the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists, and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." It is further provided (section 2326, Rev. St. U. S.) that "where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice, and making and filing of the affidavit thereof shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived. It shall be the duty of the adverse claimant within thirty days after filing his claim to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim." We are of the opinion that to hold that the interest of respondent's grantor was an adverse claim, within the meaning of the law above quoted, would be to wholly misconceive the relation existing between the applicants for the patent and the grantor of the respondent, William R. Stebbins. The claim of William R. Stebbins to a portion of placer claim No. 15 being traced to and from the same location upon which the right of the applicants for a patent rested, was not an adverse claim; it was a portion of the possessory title by which the applicants sought to obtain a patent for placer claim No. 15. Stebbins could get no legal title to the portion of the said claim except through a patent from the United States based upon the original location of Siever, Durham, Moore, and Clifton. He was therefore interested in having the patent issue, and had a right to rely upon the record title of the claim being truly presented to the authorities having charge of the issuance of said patent.

This, it appears, was not done. The abstract of the record title to said claim, as furnished to the officers of the land-office, wholly omitted the record concerning the premises in controversy, and, whether said omission was intentional or not, it was a fraud committed upon the United States and William R. Stebbins, and it is fair to presume that had the abstract furnished by the applicants shown the true state of the title to said placer claim, that William R. Stebbins would have been one of the grantees in the patent. It may be said, also, that Stebbins, having succeeded to the interest of his grantors, furnished a portion of the consideration for which the patent was issued. The bill of sale from Siever, Durham, Moore, and Clifton did not and could not convey the interest that they had previously conveyed to Stebbins and Hoffman, for the reason that they could not convey more than they owned. No parallel case was cited to the court at the argument upon the point now under consideration, but since the argument the case of *Hunt v. Patchin*, 35 Fed. Rep. 816, decided by the circuit court for the district of Nevada, has been reported. In that case Hunt filed a bill in equity to establish a trust in three mining claims in favor of himself, and to compel a conveyance to himself of such an interest therein as he might establish. The facts in the case were as follows: Hunt and Patchin were joint owners of three mining claims in Nevada, and, finding it inconvenient to raise money sufficient to pay the taxes and perform the necessary work to prevent a forfeiture, determined to relocate said claims. The relocation was made, but in the name of Patchin alone. The court found that it was understood, at least by Hunt, that although the relocation was made in Patchin's name, the location was for the benefit of both, and that Hunt furnished part of the money required to pay the expense of obtaining the patent. Patchin produced and obtained patent for the mining claims in his own name. SAWYER, C. J., in disposing of the point made by the defendant that Hunt had lost any right he had by failure to adverse the application of Patchin for a patent, said: "But one other point has sufficient plausibility to require notice. After this bill was

filed defendant applied to enter the land as mining ground, advertised in pursuance of the statute, and, no protest having been made, in due time he paid the purchase money, and a certificate of entry was issued to him. It is now insisted that as complainant did not protest and then bring suit to establish his right within the time prescribed by statute, he waived all adverse claim, and the entry is conclusive. But it was on this very title, which defendant in part holds in trust, that he obtained his certificate of entry. It was on these relocations which defendant held in trust that he proceeded, and the entry gives effect to the relocation with the trust attached. This suit was pending at the time of the application for purchase, to establish, not the legal title, but a trust in it. This claim by complainant of a trust was not adverse to the possessory title upon which the entry was made, but a part of that title, and the trust which had attached before the entry followed the title upon the entry, based upon the possessory title, of which it was a part. The complainant is entitled to the benefit of this entry to the extent of the trust." We think that the reasoning of the learned judge may be applied to the case at bar, and therefore conclude that the claim of Stebbins was not adverse within the meaning of the law.

The admission of the mining rules of Whitewood mining district, and also the transcript of the proceedings had in the land-office when the application was made to enter placer claim No. 15, in evidence, was not error, as they were not introduced for the purpose of impeaching the patent, but to show that the legal title had not by reason of accident, fraud, or mistake passed to the true owners; and the fact that respondent, in order to establish his right to have the legal title of the premises in question controlled for his benefit, had to introduce the same evidence that was introduced by the applicants when the land was entered for patent, is another strong reason why the claim of Stebbins was not an adverse claim.

Actions under the system of pleading prevailing in the code states, and bills in equity where the chancery jurisdiction is sep-

arately exercised for the purpose of establishing trusts in patented land, are now of common occurrence in the states and territories where the public land is being disposed of by the United States, and the principle invoked to establish such trust was well known to the common law in equity jurisprudence, and is plainly expressed in section 1297 of our Civil Code, which reads as follows: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it." See, also, *Lakin v. Mining Co.*, 25 Fed. Rep. 337.

The course pursued by the court in relation to discharging the jury was not error. Under the system of pleading prevailing in this territory equitable defenses to an action of ejectment may be set up by way of counter-claim, and when so set up they assume the character of a suit in equity, and it is the proper practice for the court to determine the equitable issues first, and, having determined them in favor of respondent, there was nothing for the jury to do. As supporting this mode of proceeding, see *Dupont v. Davis*, 35 Wis. 631-639; *Ingles v. Patterson*, 36 Wis. 373-376; *Bartlett v. Judd*, 21 N. Y. 200-203; Pom. Rem. §§ 97, 737, 746, 764, 792; *Lombard v. Cowham*, 34 Wis. 490, 492; Code Civil Proc. § 119, subd. 2; *Tabor v. Mackee*, 58 Ind. 290; *Cavalli v. Allen*, 57 N. Y. 508, 514; *Arguello v. Edinger*, 10 Cal. 150; *Estrada v. Murphy*, 19 Cal. 248, 272.

In conclusion, we think that the facts as exhibited by the record present a very proper case for equitable relief. No other error appearing, the judgment of the district court must be affirmed.

DORSEY, Appellant, v. HALL, Respondent.**Homestead—Question of, How Determined—Execution—Jurisdiction.**

The district court, on a motion to set aside a levy on a homestead, has no power, on affidavits, to determine the question of homestead. This should be decided in an action where the issue can be determined in the regular way. The words "proper care," in section 14, c. 38, Pol. Code, providing, "when any disagreement takes place between the owner and any person adversely interested, as to whether any land or buildings are properly a part of the homestead, it shall be competent for a district court, in any proper case, to determine such question, and all questions relating thereto," are synonymous with "proper action."

(Argued October 4, 1888; reversed October 18; opinion filed February 4, 1889.)

Appeal from district court of Lawrence county; Hon. CHARLES M. THOMAS, Judge.

Martin & Mason, for appellant.

The question of homestead cannot be tried in this summary manner upon motion and affidavits, but by the court in a proper action, in which issue shall be joined and evidence taken. *McCracken v. Weitzel*, 29 N. W. Rep. 624.

The customary, if not universal, procedure is by injunction. *Ashton v. Ingh*, 20 Kan. 670; *Swenson v. Kiehl*, 21 Kan. 533; *Goldman v. Clark*, 1 Nev. 216.

Or by bill in equity to set aside the sale and remove the cloud. *Avery v. Stephens*, 12 N. W. Rep. 211; *Liebetrau v. Goodsell*, 26 Minn. 417, 4 N. W. Rep. 813.

Hamilton & Rice, for respondent.

This proceeding, by motion on the law side of the court, to prevent the sale, and to set aside and quash the levy, is regular and proper, notwithstanding respondent might have proceeded by injunction, or, after sale, by bill in equity, to remove the cloud. *La Selle v. Moore*, 1 Blackf. 226; *Miller v. Ashton*, 7 Blackf. 29; *Hunt v. Lane*, 9 Ind. 213; *Stockwell v. Walker*, 3

Ind. 384; *Goode v. Crow*, 51 Mo. 213; *Miller v. Bartlett*, 4 West. Rep. 635.

Every court has the exclusive control of its own process, and, in the absence of any statute on the subject, they will be allowed to exercise a sound discretion in all proceedings affecting that process. *Goode v. Crow*, 51 Mo. 213; *Miller v. Bartlett*, 4 West. Rep. 635.

CARLAND, J. The record in the above action discloses that on or about the 5th day of August, 1884, the appellant herein obtained a judgment in the district court of Lawrence county against the respondent and one David H. Winyall, for the sum of \$1,759.39, and that by virtue of an execution duly issued upon said judgment the sheriff of said county did on the 18th day of December, 1886, levy upon the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, section 1, and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, section 12, township 3 N., range 6 E., situated in said county of Lawrence, as the property of said respondent; that said sheriff was proceeding to sell said land when said respondent made a motion in the district court of said Lawrence county for an order quashing and setting aside said levy, on the ground that the land hereinbefore described was the homestead of said respondent. Upon the hearing of the motion the district court granted an order quashing and setting aside the levy, for the reason urged in support of the motion. The motion was heard on affidavits. From the order quashing the levy this appeal is taken.

Several errors are assigned which involved the merits of the controversy, but, as we are of the opinion that the court had no authority to determine the question involved on motion, we will not consider those errors. The respondent seemed to have proceeded on the theory that every court has the exclusive control of its own process. This, in general, is a correct proposition, but this control does not extend to the officer executing the process. We have carefully examined the following cases cited by respondent as supporting the propriety of his proceeding, viz.:

La Selle v. Moore, 1 Blackf. 226; *Miller v. Ashton*, 7 Blackf. 29; *Hunt v. Lane*, 9 Ind. 213; *Stockwell v. Walker*, 3 Ind. 384; *Goode v. Crow*, 51 Mo. 213; *Mellier v. Bartlett*, 1 S. W. Rep. 220,—and, without reviewing each one of these cases, it may be said that they do not support the position of respondent. They are all cases in which there was some defect in the process itself, or the court had no authority to issue the execution, with the exception of the case of *Mellier v. Bartlett*, and in that case a statute of Missouri authorized a motion to be made in such a case as the one at bar. While a motion to set aside or quash an execution may be made to the court which issued it, for errors and irregularities which affect the writ itself, the same is not true in the absence of statute regarding errors and irregularities arising out of the acts of the officer executing the writ. We are therefore of the opinion that the respondent's remedy was by a proper action in court, in which issues could have been joined and the action heard in the usual mode prescribed for the trial of issues of law and fact.

Our attention was not called at the argument to section 14, c. 38, Pol. Code Dak., which we think determines the question involved here: "Sec. 14. When a disagreement takes place between the owner and any person adversely interested, as to whether any land or buildings are properly a part of the homestead, it shall be competent for the district court, in any proper case, to determine such question, and all questions relating thereto." The words "proper case" in this statute are used as synonymous with "proper action," and exclude the idea that the question of homestead can be determined on motion, where the same is disputed.

Order reversed.

**WHITE, Respondent, v. CHICAGO, M. & ST. P. RY. CO.,
Appellant.**

1. Appeal—Appellate Jurisdiction—Change of Venue.

The denial of an application for a change of venue, based upon the ground that an impartial trial cannot be had in the county where the action is pending, is appealable, as being an order involving the merits of the action within sections 23, 24, c. 20, Laws 1887.

2. Same—Discretion.

Such an application being addressed to the discretion of the court, and the judge having the right to resort to his personal knowledge with reference to the matter, nothing short of an abuse of discretion will authorize an appellate court in interfering with the order made.

3. Same—Sufficiency.

Where, from an examination of the affidavits on an application for a change of venue, the appellate court cannot say there was an abuse of discretion in denying the motion, the fact that the trial court 18 months before, on the same showing, granted a change in one of a class of cases, (the same application being made in all, and still pending,) would have but little influence with the appellate court in considering the denial of this, as the trial judge may have found the lapse of time obviated the necessity of a change in this case.

(Argued May 18, 1888; affirmed and opinion filed February 4, 1889.)

Appeal from district court of Moody county; Hon. C. S. PALMER, Judge.

Winsor & Kittredge, for appellant.

Section 23, c. 20, Laws 1887, and section 11, c. 119, of the statutes of Wisconsin, (2 Tayl. St. 1630,) are identical. When the legislature of Dakota adopted this statute it also adopted the interpretation given to it by the supreme court of that state.

The supreme court of Wisconsin has decided that an appeal can be taken from an order denying or granting a change of the place of trial under this statute. *Western Bank v. Tallman*, 15 Wis. 92; *Haas v. Weinhausen*, 30 Wis. 326; *Schattschneider v. Johnson*, 39 Wis. 387.

In New York, under a like statute, the same question has been decided by the court of appeals in the case of *Leland v. Hathorn*, 42 N. Y. 547.

The only other question is, did the court err in denying the motion in this case, together with the other 26 cases precisely similar, in which like motions were made, and which are dependent upon the decision in this case? This motion, together with the one in the *Peart Case*, were alike, were all made at the same time, and the facts relative to this motion were all before the court at the time. The court, after careful examination, concluded there was prejudice and bias in the minds of the people of Moody county, so that a fair and impartial trial could not be had, and changed the venue in the *Peart Case*. Why is that not decisive of this? Why, if a fair trial could not be had in that case, should these other cases, in every particular alike, be held differently?

The very fact that the respondent filed between two and three hundred affidavits exactly alike, of residents of Moody county, showed that there was a feeling in the county, that these cases had been discussed, and that the defendant could not have a fair trial. Taken in connection with the other affidavits, it seems to us to have presented one of the strongest cases for a change of the place of trial that has ever come before a court. There is nothing appearing here of any change in the minds of the people of this county; nothing showing that a reaction had taken place, or that this appeal had been abandoned. The same circumstances, the same facts, the same prejudices, appear upon this record in the minds of the residents of that county as appeared and convinced the court at that time. It seems to us that, if common fairness and judicial impartiality construed the affidavits in that one case in this manner, that in another case, at the same time and place, presenting exactly the same characteristics that were passed upon in the first case, the court should have made the same decision in the second case; and we can see no reason from the records why it was not done.

Rice Bros., for respondent.

An appeal will not lie from an order denying a motion to change the place of trial. Previous to the passing of chapter 20,

Laws 1887, no interlocutory orders were appealable until entry of final judgment.

Section 23, Laws 1887, allows an appeal before final judgment from certain orders which are there enumerated, before the entry of final judgment, and an order overruling a motion for a change in the place of trial is not mentioned. With the exception that an appeal can be taken from the enumerated orders before the entry of judgment, it does not appear that section 23, c. 20, Laws 1887, does away with or repeals section 22, C. C. Pro., which expressly provides that no order involving a question of discretion can be appealed from. Subdivision 2, § 22, C. C. Pro.

It clearly was not the intention of the legislature to allow an appeal from an order refusing to change the place of trial. If such had been the intention of the legislature when it passed chapter 20, Laws 1887, still the right would not exist, as it would be contrary to the Organic Act, (section 1869, Rev. St. U. S.) *Harris Manufacturing Co. v. Walsh*, 2 Dak. 43; *St. Clair County v. Livingston*, 18 Wall. 628; *Duvosneau v. U. S.*, 6 Cranch, 312; *Wiscart v. Dauchy*, 3 Dall. 321, 2 Dak. 41.

If this order was appealable, yet, the motion being one which rests in the sound discretion of the trial court, the ruling should not be disturbed unless there is a clear abuse of discretion. 39 Wis. 389; 30 Wis. 129; 52 Wis. 491; 47 Wis. 426.

In no case has an order overruling a motion for a change of venue been reversed when it had been opposed by affidavits.

Eighteen months had elapsed since the hearing of the motion in the *Peart Case* before the motion was made in this case; ample time for any excitement, growing out of the facts alleged in defendant's affidavits in support of its motion, to subside, especially as the excitement then mentioned was in October, 1885, over two years previous to the hearing on the motion appealed from.

CARLAND, J. This is an appeal from an order made by the district court of Moody county, at the January term thereof,

A. D. 1888, refusing to change the place of trial of said action. This action was instituted in the district court of Moody county prior to May, 1886, for the purpose of recovering damages of the appellant resulting from a fire claimed to have been set out by appellant's engine on October 10, 1885.

The first question to be disposed of is the objection of the respondent that the order appealed from is not appealable. Section 23, c. 20, Laws 1887, enumerates the court orders which may be carried to this court on appeal. Said section 23 contains the exact language of section 10, c. 264, Laws Wis., enacted in 1860, being section 11, p. 1635, Tayl. St. Under the latter section the supreme court of Wisconsin held in the cases of *Bank v. Tallman*, 15 Wis. 101; *Haas v. Weinhagen*, 30 Wis. 326; and *Schattschneider v. Johnson*, 39 Wis. 387,—that an order similar to the one appealed from in this case was appealable. The court of appeals of New York also, in the case of *Leland v. Hathorn*, 42 N. Y. 547, decided that an order refusing to change the place of trial was appealable. The opinion in the latter case gives no reason why such an order is appealable, but it is to be observed that the statute of New York at the time *Leland v. Hathorn* was decided was the same as the statute upon which the decisions in Wisconsin are based. The decision in *Schattschneider v. Johnson*, 39 Wis. 387, is based upon the authority of *Haas v. Weinhagen*, 30 Wis. 326. In the latter case the court decided that an order changing the place of trial was appealable either under section 11, above referred to, or section 6, p. 1632, Tayl. St., which latter section provides that upon an appeal from a judgment the supreme court may review any intermediate order involving the merits, and necessarily affecting the judgment. A similar provision is found in our law in section 24, c. 20, Laws 1887. In *Bank v. Tallman*, *supra*, the court decided that an order refusing to change the place of trial was appealable upon the grounds stated in the opinion of Justice COLE in the case of *Oatman v. Bond*, 15 Wis. 23. In the case last mentioned the court held that an order made in an action to foreclose a mortgage, directing that the action be referred to a certain person to

take all the testimony to be taken in that state, which either party might desire to use on the trial, was appealable under the fourth clause of section 10, c. 264, Laws Wis. 1860, being the same as the fourth clause of section 11, c. 139, Tayl. St., and the fourth clause of section 23, c. 20, Laws Dak. 1887, for the reason that it deprived the party of a right granted him by the constitution of Wisconsin, viz., to have his witnesses examined in open court, and therefore the order was one which involved the merits of the action. In the case of *St. John v. West*, 4 How. Pr. 329, Justice SELDEN held that an order denying an application to substitute certain parties as plaintiffs in the place of the original plaintiff, who had deceased since the commencement of the action, was appealable. The judge said that the statute gave to the personal representatives of the deceased the right to come in and continue the action, and therefore an order denying it involved the merits of the action. In *Cram v. Bradford*, 4 Abb. Pr. 193, it was held that an order which directed a reference in a case in which a reference was not authorized by law was an order involving the merits, and appealable. Justice COLE in *Oatman v. Bond*, *supra*, said: "The 'merits' of an action do not relate to the moral and abstract rights of the case, without reference to the constitution of judicial tribunals, or their mode of investigating facts, or their well-established rules of practice." It will thus be seen that the jurisdictions in which sections 23, 24, c. 20, Laws 1887, have been in force, and from which we may be said to have borrowed them, have construed the fourth clause of said section 23 as permitting an appeal from an order similar to the one herein appealed from, for the reason that "it involves the merits of the action, or some part thereof." They have also construed said section 24 as permitting an order similar to the one herein appealed from to be reviewed on appeal from final judgment, for the reason that it "involved the merits of the action." It necessarily follows that the legislature of Dakota territory, having adopted said sections from other jurisdictions, has also adopted the construction put upon the same by the appellate court of those jurisdictions, and, this being so, we

must hold that the order appealed from in this action is appealable. We think this position to be correct, both upon principle and authority. The right to have the rights of a party passed upon by an impartial and unprejudiced tribunal is fundamental, and guarantied by the law of the land, and an order which would affect this right, as an order refusing to change the place of trial might, would certainly, under the most strict construction, involve the merits of the action.

We now come to the question as to whether the court erred in refusing to change the place of trial. There were some 26 similar cases besides this one pending against this appellant at the June term of the Moody county district court, in all of which cases a similar motion was made to change the place of trial. In one case the place of trial was changed upon the same showing as made in this action. This case, and all others of a similar nature, were continued from time to time until the January term of said court, in 1898, at which term the motion in this case was taken up, and after argument denied. The motion was made for the reason that the appellant had good reason to believe that an impartial trial could not be had in the county of Moody in consequence of a very strong and prevalent feeling among the citizens thereof in favor of respondent, and against appellant. In support of said motion the affidavits of John A. Hinsey, John W. Carey, Roger Brennan, and A. W. Tennant, claim agents and attorneys of the appellant, were read. Opposed to these were the affidavits of over 200 farmers and business men of Moody county, denying the existence of any prejudice against the appellant among the citizens of said county. We have examined the affidavits in the record, and in the face of the proposition that the decision of this motion rested in the sound legal discretion of the district court, and that nothing short of an abuse of such discretion will justify us in interfering, we cannot say, in the present case, there was an abuse of discretion. The district judge may have been influenced by his personal knowledge and observation, to which he had a right to resort. *Schattschneider v. Johnson*, *supra*; *Jackson Will Case*, v.5DAK.—33

27 Wis. 409; *Lego v. Shaw*, 38 Wis. 401. The fact that in June, 1886, the district court granted a change of venue in a similar case, upon the same grounds as were urged in support of this motion, cannot have much influence in the decision of this appeal, as the lapse of a year and a half might have rendered it unnecessary to have granted the motion in this action. The district judge was in a position at the hearing of the motion in January, 1888, to ascertain largely for himself whether the feeling which existed in June, 1886, still remained. If at the same term the place of trial was granted in one case the district court had refused to grant the change in this case, that circumstance would be strong evidence of abuse of discretion. Order denying motion affirmed.

GAY, Respondent, *v.* FREMONT, E. & M. V. RY., Appellant.

Railroads—Killing Stock—Sufficiency of Evidence.

In an action against a railroad company to recover the value of a heifer killed upon the track, it appeared she was at large unattended, and came upon the track at a point where she could not have been seen by the men in charge of the engine in time to have averted the accident; that after she was seen everything possible was done to prevent the injury. *Held*, the evidence was insufficient to support a verdict in favor of the plaintiff.

(Argued October 9, 1888; reversed October 18; opinion filed February 9, 1889.)

Appeal from a judgment of the district court for Custer county entered upon a verdict in favor of the plaintiff, and from an order overruling a motion for a new trial.

The action was brought to recover the value of a heifer owned by the plaintiff, alleged to have been killed by the negligence of the defendant in running its train upon her. Upon the trial of the action in the court below the plaintiff obtained a verdict. Motion to set the verdict aside, upon the ground that it was without evidence to support it, was duly made, and denied. Judgment was duly entered for the respondent. Motion for a new

trial was made on behalf of the defendant, and denied, and from such judgment and order overruling the motion for new trial the defendant appealed to this court. The further facts material to the case are set forth in the opinion.

J. W. Fowler, for appellant.

The defendant is only liable for gross negligence. *Williams v. Northern P. R. R. Co.*, 3 Dak. 168, 14 N. W. Rep. 97; *Maynard v. R. R.*, 115 Mass. 460; *Locke v. St. Paul & Pac. R. R. Co.*, 15 Minn. 355, (Gil. 283;) *Darling v. R. R. Co.*, 121 Mass. 121.

The court should have granted defendant's motion for new trial, because there is no evidence that the injury was the result of the careless or negligent management of the train in question.

The only evidence of negligence was that of the killing, which raised a presumption of law, but this was rebutted by the defendant.

After this it was necessary for the plaintiff to prove that the injury was caused by the negligence of the defendant. *Spaulding v. R. R. Co.*, 33 Wis. 582; *Kerwhacker v. C. C. & C. R. R. Co.*, 3 Ohio St. 196; *Lock v. St. Paul & Pac. R. R. Co.*, 15 Minn. 362, (Gil. 283;) *C. H. D. R. R. Co. v. Waterson & K.*, 4 Ohio St. 433; *C. O. R. R. Co. v. Lawrence*, 13 Ohio St. 70. See, also, *Columbus, C. & I. C. R. R. Co. v. Froesch*, 57 Ill. 155; *Chicago & A. R. R. Co. v. Purvines*, 58 Ill. 38; *Metropolitan R. R. Co. v. More*, 121 U. S. 558, 7 Sup. Ct. Rep. 1334; *Crane v. Morris*, 6 Pet. 598; *Kelly v. Jackson*, Id. 622; *United States v. Wiggins*, 14 Pet. 334; *Fisher v. Farmers, etc.*, 21 Wis 74; 4 Ohio St. 477; *Walker v. Herron*, 22 Tex. 55; *Woodward v. Purdy*, 20 Ala. 379; Whart. Neg. §§ 883, 901; *Cent. O. R. R. v. Lawrence*, 13 Ohio St. 166; *N. W. & E. R. v. Skinner*, 19 Pa. St. 801; *Bellefontaine R. R. v. Bailey*, 11 Ohio St. 333; *Corwin v. R. R. Co.*, 13 N. Y. 42; *Shepherd v. Buff. R. R.*, 35 N. Y. 641; *Ind. R. R. Co. v. Shimer*, 17 Ind. 295; *Joliet R. R. v. Jones*, 20 Ill. 221; *Jeff. M. & I. R. R. v. Dawes*, 43 Ind. 402.

Chauncey L. Wood, for respondent.

No brief on file.

SPENCER, J., (*after stating the facts as above.*) The undisputed evidence in this case upon the question of the negligence of the defendant—and upon that question there was no conflict of evidence—shows that the plaintiff was the owner of a heifer, which he permitted to run at large and unattended upon lands contiguous to the railroad track of the defendant; that on or about the 15th day of July, 1886, while the defendant was running one of its trains over its railroad in the ordinary course of its business, plaintiff's said heifer came upon defendant's railroad track at a point about 50 feet in advance of the moving train, and was struck by the engine drawing such train, and killed. The animal was first discovered by the engineer in charge of the train in a narrow cut, a short distance around a curve from the direction the train was moving. The train, composed of 15 loaded freight cars, was running at the rate of from 12 to 15 miles an hour on a down grade at the time the animal was discovered on the track. The engineer and train-men were looking out for cattle, as it was usual to find them on the track in that vicinity. As soon as the animal was seen, (and the evidence is conclusive that she could not have been discovered by the train-men earlier than she was,) the engineer applied the brakes, and gave the usual signals for stopping. The whistle was also blown repeatedly for the purpose of frightening the animal from the track. Every precaution possible seems to have been taken to prevent the accident. There is no complaint or proof that the engine or train was not properly equipped, and had not all the modern facilities and appliances provided for running and controlling it; nor is there any evidence tending to show that the defendant was guilty of any negligence in the manner of running its trains, or that the engineer or train-men were incompetent to properly discharge the duties they were engaged in; or that the train could, by the exercise of any degree of care or skill, under the conditions then existing, have been

stopped before striking the animal, or the accident in any way averted. On the contrary, the evidence shows clearly that every precaution and care that could have been taken was in fact exercised to prevent the injury complained of. The evidence in the case was insufficient to support the verdict of the jury, and the motion to set the verdict aside should have been granted. *Williams v. Railroad Co.*, 3 Dak. 168, 14 N. W. Rep. 97; *Maynard v. Railroad Co.*, 115 Mass. 460; *Locke v. Railroad Co.*, 15 Minn. 355, (Gil. 283.) The judgment appealed from must therefore be reversed, and a new trial ordered.

All the justices concurring, except THOMAS, J., not sitting.

SONGSTAD, Respondent, v. BURLINGTON, C. R. & N. RY. CO., Appellant.

Master and Servant—Negligence—Sufficiency of Evidence.

Plaintiff, while in the service of the defendant in loading cars from a gravel-pit with which he was familiar, received injuries by a falling bank. It appeared the defendant's foreman, under whom the plaintiff worked, with notice to the plaintiff and the other laborers, went upon the bank, and tried to pry it down, but, not succeeding at first, the plaintiff returned, working at a point where he could see the foreman, and that he regarded safe, but he was afterwards caught by the falling bank. *Held*, there was no question of fact for a jury: (1) There was no negligence on the part of the defendant; (2) such an injury was one of the ordinary risks of the service in which the plaintiff engaged. PALMER, J., dissenting.

(Argued May 9, 1888; reversed May 25; opinion filed February 9, 1889.)

Appeal from district court, Minnehaha county; Hon. C. S. PALMER, Judge.

This appeal is from a judgment of the district court entered upon a verdict, and from an order overruling motion for a new trial. The action was brought to recover damages alleged to have been sustained by the respondent by reason of the negligence of the appellant. The respondent was in the employ of

appellant in the capacity of a shoveler, and at the time he received the injuries complained of was engaged in loading cars from a gravel-pit, under the direction of respondent's foreman. An embankment of earth had been formed by the removal of gravel under it, 12 or 13 feet high, and was frozen. The foreman, with the knowledge of the respondent, attempted to pry the bank down. While the foreman was thus engaged, the respondent selected a place for continuing his work, from which place the foreman was in full view as he worked, and which he considered far enough removed from the bank, though it should fall, to insure his safety. As the bank began to fall the respondent attempted to retreat further, and stumbled over a clod of earth and fell, and was caught by the falling earth, and his leg broken. To recover the damages caused thereby this action was brought. At the close of plaintiff's case the appellant moved the court to direct a verdict for defendant on the ground that there was not sufficient evidence to support a verdict for the plaintiff, which motion was overruled. A similar motion was made after the evidence was closed, and again denied; to each of which rulings appellant excepted. The respondent had a verdict, and, after motion for new trial on behalf of appellant was denied, judgment was duly entered for plaintiff, from which appellant appealed, assigning each of the rulings aforesaid as error. The other material facts are stated in the opinion.

Boyce & Boyce and S. K. Tracy, for appellant.

There was not sufficient evidence of negligence to justify the submission of the case to the jury.

The injury was also one of the ordinary risks which the plaintiff assumed in engaging in the business. *Naylor v. C. & N. W. Ry. Co.*, 53 Wis. 664, 11 N. W. Rep. 24; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Olson v. McMullen*, 24 N. W. Rep. 318; *Galveston Ry. v. Lempe*, 11 Amer. & Eng. R. Cas. 201; *Wood, Mas. & Serv.* §§ 326, 349; *McGlynn v. Brodie*, 31 Cal. 377; *Patters. Ry. Accident Law*, 381; *Cassidy v. Maine C. R. R. Co.*, 76 Me. 488, 17 Amer. & Eng. R. Cas. 519.

The master is bound to use due diligence in hiring competent fellow-servants, providing safe machinery and appliances, and must not be guilty of personal negligence. Having fulfilled these conditions, he is not liable for injuries received by the servant. *Haine v. C. & N. W. Ry. Co.*, 58 Wis. 525, 17 N. W. Rep. 420; *Hoth v. Peters*, 55 Wis. 405, 18 N. W. Rep. 219; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 439; *Hofnagle v. N. Y. Cent. Ry.*, 55 N. Y. 608; *McCosker v. L. I. Ry. Co.*, 84 N. Y. 77; *Brickner v. N. Y. Cent. Ry.*, 2 Lans. 506; *Cassidy v. Maine Cent.*, 76 Me. 488.

Parlman & Stoddard, for respondent.

The placing respondent, with others, in this pit, with an overhanging bank of frozen earth was an act of negligence on the part of the company. These men were placed in this position of danger by their foreman. They were there for the purpose of loading the train with gravel. They were there under his direction, and had a right to, and did, rely upon his superior judgment. He was engaged in an effort which, at its inception, he regarded as dangerous, of which opinion this respondent had prompt notice. After this notice the foreman, who had the safety of these men in his charge, advised them of the absence of danger, and they had a right to rely upon it. Equivocation disregarded, the statement is nothing more nor less than that these men were placed in this dangerous place upon the positive assurance of the company that there was no danger. The overhanging bank was evidently dangerous, and rendered more so by a direct act of the company, and injury resulted to this respondent after an assurance from the company that there was no danger, upon which assurance respondent had a right to rely. *Seller v. Chicago & N. W. Ry. Co.*, 1 N. W. Rep. 96.

It is claimed that the injury was one of the ordinary risks of the business. The rule, however, is that it is the duty of the master to exercise care and prudence that those in his employment be not exposed to unreasonable risks and dangers.

And the servant has a right to understand that the master will exercise that diligence in protecting him from injuries, and in selecting the agent from which it may arise. *Connolly v. Poillion*, 41 Barb. 366.

SPENCER, J., (*after stating the facts as above.*) The evidence in this action, when construed most favorably to the plaintiff, discloses that in November, 1885, he engaged his services to the defendant as a laborer; that he and a considerable number of other men were at work under the supervision of one Mahoney, as foreman, in the work of shoveling gravel from a gravel bed or bank onto a train of platform cars, which, when loaded, were drawn to Sioux Falls, a distance of a few miles, emptied, and returned to the pit for the purpose of being reloaded; that the plaintiff had been thus engaged 10 days or more when the accident complained of occurred; that about November 25, 1885, an overhanging bank of the gravel-pit, 12 or 13 feet high, having been produced by the removal of gravel under and adjacent to it, was attempted to be pried down by the foreman, who for that purpose went upon the bank with a bar, and commenced prying, having first given the men in his charge notice of what he was about to do. The plaintiff and the other men at work heard the warning, and stopped working for a few moments, and watched the foreman's efforts to pry down the bank. The bank failing to yield to his efforts, the foreman told the men to proceed with their work. The foreman continued his efforts to break down the bank, and the plaintiff returned to his labors at a point from which he could see him, (the foreman;) and when he supposed he was in a place of safety, to use his language, "We went to work again. In mean time, while I was yet at work, the boss was breaking on that piece upon the bank. * * * I thought we were so far away from the cut, we were out of the way. I thought sure it could not hurt me. Then I saw it come,—I saw the bank come down. I was trying to get back. There was a big chunk lying in the way. I got one foot out of the way, but the other got caught. I ran against this chunk

behind me, and fell down on it. Then I tried to get my leg out, and I could not do it. * * * They broke out the dirt above my leg, and got it loose. Then I saw it was broken. The chunk that fell on my leg and broke it came from the top of the bank,—the piece he broke down. I did not hear him tell us to look out any more after he told us to go to work. When the bank broke, he hollered, 'Look out!' * * * There were about twenty men employed there loading trains with gravel. These men were all working under Dan. Mahoney, as foreman. He would help get the gravel and dirt down to load the trains. Mahoney was up on top of the bank just before I got hurt. He was trying to pry down the top of the bank. I saw him there. He would take the crow-bar and pry off the top of the bank, and push it down. I saw him pushing the frozen dirt off. I thought I was far enough away. When it came down I stepped backwards, and struck the frozen clod that was lying there, and fell over. The part that fell down there struck me after I fell down there. That is the way the accident happened. Mahoney would tell us when to shovel. He did not exactly say which place we should shovel; told us to go around the cars, and go to work. He would tell us to load the train. I believe he did sometimes take a hand himself in loading, and at other times he would pry down the bank for us to load what he pried down."

The train being loaded at the time of the accident comprised 14 cars. This was substantially all the evidence in the case in favor of the plaintiff's right to recover, and it is obvious that it wholly fails to establish negligence on the part of the appellant. There is no pretense that Mahoney was not an entirely competent person for foreman, or that the defendant was guilty of any negligence in engaging his services in the capacity in which he was employed. Was the foreman himself negligent? It will not be pretended that it was negligence in him going upon the bank, and attempting to break it down, especially as he gave warning to the men in his charge, which the plaintiff understood, that he was about to do so. Nor can it rightfully be said that his negligence in continuing his efforts to pry off the bank,

after directing the men to return to work, and without informing them that he was doing so, was negligence to this plaintiff, or that it resulted in the injuries complained of. He did not ask them, or any of them, to work in any place of peril, but merely to load the train. The plaintiff evidently did not understand that he was to work under or in such close proximity to the overhanging bank as to endanger his safety. On the contrary, when he returned to his work he took his place, as he says himself, not very near to the bank, but at some distance from it; so much removed from it that he believed it was to him a place of safety, and, though it might fall, as it did, it could not reach him. He was fully acquainted with the circumstances and the condition of the pit; had been constantly employed there for many days preceding the accident; and of his own judgment, and without let or hinderance, selected a place at which to perform his work. There was therefore no negligence proven on the part of the defendant or the foreman.

Another sufficient defense under the facts as established by the evidence in behalf of the plaintiff is that the injury complained of was one of the ordinary risks which he assumed when he engaged his services to the defendant, in the business which he undertook. He was a person of usual intelligence, in possession of all his faculties. He was entirely familiar with the gravel-pit, the height of the embankment, and the effect of the thawing frost upon it; also that the foreman and conductor were trying to pry it down. He saw them at work, and understood the situation in all respects; and notwithstanding it was fraught with danger to a greater or less extent, (and this it was, to his own knowledge,) he assented to incur the dangers to which he was thereby exposed, and proceeded with his work. It is difficult to perceive in this case that any precautions for his safety had been neglected, but, if they had, having consented to serve in the way and manner in which the business was being conducted, with full knowledge thereof on his part, he cannot now be heard to complain. The following cases are analogous to the one at bar, and fully sustain the respondent's contention:

Naylor v. Railroad Co., 53 Wis. 664, 11 N. W. Rep. 24; *Sullivan v. Manufacturing Co.*, 113 Mass. 896; *Olson v. McMullen*, (Minn.) 24 N. W. Rep. 818; *Railway Co. v. Lempe*, 11 Amer. & Eng. R. Cas. 201; *Leonard v. Collins*, 70 N. Y. 90. The trial court erred in denying respondent's motion for direction of a verdict in its favor, and in overruling its motion for a new trial. The judgment must therefore be reversed, and a new trial ordered. Judgment reversed.

All concur, except Justice PALMER, dissenting.

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ELLIOT, Respondent, v. CHICAGO, M. & ST. P. RY. CO., Appellant.

1. Master and Servant—Negligence—Fellow-Servants—Who are.

A section foreman and the conductor of a train are co-employees within the meaning of the rule of the common law, and also section 1180, C. C., providing that an employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the negligence of another person employed by the same employer in the same general business.

2. Same—Contributory Negligence—What amounts to.

In an action against a railroad company by a widow, to recover damages for causing the death of her husband through alleged negligence, it appeared a "flying switch," in violation of the rules of the company, was being made by the direction of a conductor of a train, and the deceased, in endeavoring to cross one of the tracks, was caught by the rear section of the train and killed: but it also appeared that he must have known the switch was being made, and that he could have seen this section had he turned and looked in its direction before stepping on the track. *Held*, the deceased was guilty of such contributory negligence as would defeat a recovery.

3. Evidence—Relevancy—Habits of Care.

On an issue of a deceased person's contributing to the negligent act causing the death, where there were eye-witnesses of the occurrence, the fact of his being a usually careful man is immaterial.

(Argued May 9, 1887; reversed May, 1887; reargued May 11, 1888; opinion filed February 9, 1889.)

Appeal from a judgment of the district court of the Fourth district, in and for the county of Clay, entered in favor of the plaintiff, upon a verdict.

The action was brought to recover damages for the death of John Elliot, plaintiff's husband, alleged to have been caused by defendant's negligence.

The deceased at the time of his death was in the employ of the defendant as a section foreman, and the injuries from the effect of which he died were occasioned by the negligence of other of defendant's employees in running a freight train, and while making a flying switch. The facts and circumstances connected with the accident, so far as material, are stated in the opinion.

R. B. Tripp, (H. H. Field, of counsel,) for appellant.

There was no negligence on the part of the defendant or its employees which caused or contributed to the accident.

The charge of negligence is that the conductor of the train made what is claimed to have been a "flying switch," in alleged violation of the rules of the defendant.

The court charged the jury that the mere fact that a flying switch was made, even if it was in violation of the rules of the company, would not be sufficient evidence of negligence to make the defendant liable, and such is the rule laid down by the authorities. *Youll v. Ry. Co.*, 66 Ia., 846, 351, 23 N. W. Rep. 736; *Jeffrey v. R. R. Co.*, 51 Ia., 439, 1 N. W. Rep. 765.

But the court submitted to the jury the question whether or not there was negligence on the part of the conductor in the manner in which the alleged switch was made. While it is undoubtedly true that the making of a flying switch in a populous city or village, or over highway crossings, may be negligence as against the public rightfully crossing railroad tracks, it has never been held that making such a switch by a company on its own grounds was negligence as to employees. It is not negligence for a railroad company to move trains on its station grounds without giving warning to employees engaged thereon, where there

is nothing to prevent the employes from seeing or knowing of the approach of such trains. *Kelley v. Ry. Co.*, 53 Wis. 74, 78, 9 N. W. Rep. 816; *C. & N. W. Ry. Co. v. Donahue*, 75 Ill. 106.

There was no proof given upon the trial that the rule in question was for the protection of employes, or that it was intended to prohibit such switches upon station grounds. It is fair to presume that the object of the rule was to prevent injury to persons rightfully upon station grounds of the company as passengers, or travelers upon public crossings.

It could not be considered negligence, at least as to employes, to make such a switch upon depot grounds at an insignificant station like Meekling, in broad daylight, and where there is no object preventing a free view of the track and cars in all directions. The evidence shows that Meekling at the time of this accident was a place containing only five or six buildings, and not even of sufficient importance to warrant the employment of a station agent. It seems to us clear that the method of handling the train adopted at the time of the accident was not of such a character as to warrant the submission of the question of negligence to the jury, as to the deceased, who was an old employe, and acquainted with the locality and the passage of trains.

Again, the evidence shows that the flying switch had been accomplished, and it cannot be said to have been the real and direct cause of the accident to the deceased. *Galveston, etc., Ry. Co. v. Bracken*, 14 Amer. & Eng. R. Cas. 691.

The defendant is not liable under section 1130, C. C.

1. The accident arose in consequence of the ordinary risks of the business in which the deceased was employed. *Wood, Mast. & Serv.* § 326; 3 *Wood, Ry. Law*, 1452; 2 *Thomp. Neg.* 1008, 1009; *Patt. Ry. Acc. Law*, 342; *Randall v. R. R. Co.*, 109 U. S. 478, 483, 3 *Sup. Ct. Rep.* 322; *Herbert v. R. R. Co.*, 13 N. W. Rep. 349, 116 U. S. 642, 647; *Howland v. Ry. Co.*, 54 Wis. 226, 230, 11 N. W. Rep. 529; *De Forest v. Jewett*, 88 N. Y. 264; *Ladd v. R. R. Co.*, 119 Mass. 412; *Hughes v. R. R. Co.*, 27 Minn. 137, 6 N. W. Rep. 553; *Fraker v. Ry. Co.*, 32 Minn. 54, 19 N. W. Rep. 345; *Dowell v. Ry. Co.*, 62 Iowa, 629,

17 N. W. Rep. 901; *C. & N. W. Ry. Co. v. Donahue*, 75 Ill. 106; *Sweeney v. R. R. Co.*, 57 Cal. 15; *Pennsylvania R. R. Co. v. Wachter*, 60 Md. 395, 15 Amer. & Eng. R. Cas. 187; *Clifford v. R. R. Co.*, 141 Mass. 564, 6 N. E. Rep. 751; *McGrath v. R. R. Co.*, 14 R. I. 357, 18 Amer. & Eng. R. Cas. 5.

2. The negligence, if any, was that of persons employed in the "same general business," within the meaning of section 1130.

This section was before this court in *Herbert v. Northern Pacific R. R. Co.*, 18 N. W. Rep. 349, and also before the supreme court of the United States in the same case, 116 U. S. 642, 6 Sup. Ct. Rep. 590. The doctrine to be gathered from those decisions is that this section is but a re-enactment of the common law, and that in itself it creates no new rule, but expresses the law as it was before the section was adopted.

The great weight of authority is that a conductor and section foreman, under the circumstances shown in this case, are persons engaged in the "same general business." With the exception of a few cases, upon exceptional facts, mostly arising in the southern states, we are not aware that it has ever been held to the contrary in any well-adjudicated case.

The decision in *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, from its facts, is not applicable here.

The following decisions will indicate the weight of authority upon this question: *Randall v. R. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322,—switchman and engineer; *Howard v. Ry. Co.*, 26 Fed. Rep. 837,—fireman and engineer of different trains; *Clifford v. R. R. Co.*, 141 Mass. 564, 6 N. E. Rep. 751,—section-man and engineer; *Keyes v. R. R. Co.*, (Pa.) 3 Atl. Rep. 15,—section-man and engineer; *Collins v. R. R. Co.*, 30 Minn. 31, 14 N. W. Rep. 60,—section-man and engineer; *Whalan v. R. R. Co.*, 8 Ohio St. 249,—section-man and engineer; *Gormley v. Ry. Co.*, 72 Ind. 31, 5 Amer. & Eng. R. Cas. 581,—section-man and engineer; *R. R. Co. v. Wachter*, 60 Md. 395, 15 Amer. & Eng. R. Cas. 187,—section-man and engineer; *R. R. Co. v. Rider*, 62 Tex. 267,—section-man and engineer; *Boldt v. R. R. Co.*, 18 N. Y. 432,—

track-man and engineer; *Blake v. R. R. Co.*, 70 Me. 60, 35 Amer. Rep. 297,—section-man and train-men; *Coon v. R. R. Co.*, 5 N. Y. 492,—section-man and train-men; *Foster v. Ry. Co.*, 14 Minn. 360, (Gil. 277,)—section-man and train-men; *Capper v. R. R. Co.*, 103 Ind. 305, 2 N. E. Rep. 749, 21 Amer. & Eng. R. Cas. 525,—track-man and engineer; *Henry v. Ry. Co.*, 81 N. Y. 373,—shoveler and train-man; *Russell v. R. R. Co.*, 17 N. Y. 134,—shoveler and engineer; *Howland v. Ry. Co.*, 54 Wis. 226, 11 N. W. Rep. 529,—shoveler and conductor; *Heine v. Ry. Co.*, 58 Wis. 525, 17 N. W. Rep. 420,—shoveler and conductor; *Cooper v. Ry. Co.*, 23 Wis. 668,—brakeman and section-men; *Roberts v. Ry. Co.*, 33 Minn. 218, 22 N. W. Rep. 389,—baggage master and switchman; *Brown v. Ry. Co.*, 31 Minn. 553, 18 N. W. Rep. 834,—engineer and station agent; *Toner v. Ry. Co.*, (Wis.) 31 N. W. Rep. 104,—brakeman and station agent; *Brown v. Ry. Co.*, (Cal.) 7 Pac. Rep. 447,—engineer and switchman; *Besel v. R. R. Co.*, 70 N. Y. 171,—car-repairer and brakeman; *Valtes v. Ry. Co.*, 85 Ill. 500,—car-repairer and engineer; *Farwell v. R. R. Co.*, 4 Met. 36,—engineer and switchman; *Harvey v. R. R. Co.*, 88 N. Y. 481,—fireman and switchman; *Holden v. R. R. Co.*, 129 Mass. 268,—brakeman and track-men.

A similar provision to section 1130 is in force in California, (section 1970, Civil Code,) and the decisions in that state support the position here taken. *Brown v. R. R. Co.*, 12 Pac. Rep. 512,—conductor and engineer; *Same v. Same*, 7 Pac. Rep. 447,—engineer and switch-tender; *Kivem v. Mining Co.*, 11 Pac. Rep. 740,—workmen in mine; *Collier v. Steinhart*, 51 Cal. 116,—miner and superintendent; *McLean v. Mining Co.*, Id. 256,—miner and foreman; *McDonald v. Hazeltine*, 53 Cal. 35,—long-shoreman and foreman; *Hogan v. R. R. Co.*, 49 Cal. 128,—helper and driver.

The only case relied on by the counsel for the plaintiff at the trial to sustain the position that the conductor and the deceased were not engaged in the same general business was *Garrahy v. R. R. Co.*, 25 Fed. Rep. 258. That decision is an extreme one, and it may well be doubted whether it is in accord with *Ry. Co.*

v. *Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, which it professes to follow. It is carefully considered by Mr. Justice BREWER in *Howard v. Ry. Co.*, 26 Fed. Rep. 837, and he reaches the conclusion that it is not sustained by the current of authority in the federal courts. See, also, *Van Wickle v. Ry. Co.*, 32 Fed. Rep. 278; *Easton v. Ry. Co.*, Id. 893; *Naylor v. R. R. Co.*, 33 Fed. Rep. 801; *Ry. Co. v. Ry. Co.*, 31 Fed. Rep. 527; *Anderson v. Winston*, Id. 528.

Section 1131 has no application to this case. The construction of this statute given by the supreme court of the United States in the *Herbert Case* is that it is a re-enactment of the common law, and that it makes the employer liable for his own negligence, either in the employment of incompetent persons or in the providing or maintaining of suitable and safe machinery. It cannot have any application to this case. See, also, *Howard v. Ry. Co.*, 26 Fed. Rep. 837, 842; *Slater v. Jewett*, 85 N. Y. 61, 67, 72-75; *Rose v. R. R. Co.*, 58 N. Y. 217; *Collins v. Ry. Co.*, 30 Minn. 31, 14 N. W. Rep. 60; *Roberts v. Ry. Co.*, 33 Minn. 218, 22 N. W. Rep. 389; *Heine v. Ry. Co.*, 58 Wis. 525, 531, 532, 11 N. W. Rep. 529; *Peschel v. Ry. Co.*, 62 Wis. 338, 21 N. W. Rep. 269; *Ry. Co. v. Gordon*, 17 Ill. App. 63, 65.

The accident was caused by the want of ordinary care on the part of the deceased. *Holland v. Ry. Co.*, 18 Fed. Rep. 243, 5 McCrary, 549; *Behrens v. Ry. Co.*, 5 Col. 400, 8 Amer. & Eng. R. Cas. 184; *Haley v. R. R. Co.*, 7 Hun, 84; *Keyes v. R. R. Co.*, (Pa.) 3 Atl. Rep. 15; *R. R. Co. v. De Pew*, 40 Ohio St. 121; *C. & N. W. Ry. Co. v. Donahue*, 75 Ill. 106, 108; *Myers v. Ry. Co.*, 113 Ill. 386, 1 N. E. Rep. 899; *Galveston, etc., Ry. Co. v. Bracken*, 14 Am. & Eng. R. Cas. 691; *Grethen v. Ry. Co.*, 22 Fed. Rep. 609; *Clark v. R. R. Co.*, 128 Mass. 1; *Delaney v. Ry. Co.*, 33 Wis. 67; *Bresnahan v. R. R. Co.*, 49 Mich. 410, 13 N. W. Rep. 797; *Donaldson v. R. R. Co.*, 21 Minn. 293, 297; *Rogstad v. Ry. Co.*, 31 Minn. 208, 12 N. W. Rep. 287.

It will not be contended that the rule above stated as to the

duty to look and listen is not a correct statement of the law, but the claim is, as we understand it, that the jury might exonerate the deceased from the charge of negligence, for two reasons: *First*. Because the deceased at the time of the accident was engaged in performing some duty of his employment, and, while so engaged, was not negligent in not observing the approach of the rear section of the train. *Second*. Because a flying switch was being made, which was prohibited by the rules of the company, upon the obedience of which the deceased had a right to rely. 1. The first ground is untenable for the reason that the deceased was not necessarily upon the main track at the time of the accident. *Iron Co v. Brennan*, 20 Brad. (Ill.) 555; *Cunningham v. Ry. Co.*, 17 Fed. Rep. 882, 5 McCrary, 465; *Holland v. Ry. Co.*, 18 Fed. Rep. 243, 5 McCrary, 549; *R. R. Co. v. Jones*, 95 U. S. 439; *Kresanowski v. R. R. Co.*, 18 Fed. Rep. 229, 5 McCrary, 528; *Behrens v. Ry. Co.*, 5 Col. 400, 8 Amer. & Eng. R. Cas. 184, 186; *Abend v. R. R. Co.*, 111 Ill. 202, 17 Amer. & Eng. R. Cas. 614, 53 Am. 616; *Simmons v. R. R. Co.*, 110 Ill. 340, 18 Id. 50; *Martensen v. R. R. Co.*, 60 Iowa, 705, 15 N. W. Rep. 569. 2. The fact that a flying switch was being made at the time did not relieve the deceased from the duty of looking for approaching trains. *Ormsbee v. R. R. Co.*, 14 R. I. 102, 51 Amer. Rep. 354; *Grethen v. Ry. Co.*, 22 Fed. Rep. 609.

The decisions to the contrary are based upon exceptional circumstances. Those relied upon by the plaintiff at the trial are all distinguishable from the facts in this case. They were cases where flying switches were made over highway crossings, or upon the depot grounds or public places, and the persons injured were none of them employees. They are distinguished in *Ormsbee v. R. Co.*, *supra*. See *Hinckley v. R. R. Co.*, 120 Mass. 257.

As to employees, the fact that a flying switch is being made does not relieve them from the duty to look and listen. *Behrens v. Ry. Co.*, *supra*; *Haley v. R. R. Co.*, 7 Hun, 84; *Myers v. Ry.*

Co., 113 Ill. 386, 1 N. E. Rep. 899; *Ry. Co. v. Bracken*, 14 Amer. & Eng. R. Cas. 691.

The rule of the supreme court of the United States is that where the evidence shows that the person injured failed to look and listen for the approaching train, when by so doing he might have avoided the danger, there is nothing to submit to the jury, and the court should direct a verdict for the defendant. *R. R. Co. v. Houston*, 95 U. S. 697; *Schofield v. Ry. Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125.

The court erred in admitting evidence of the general habits and character of the deceased as to carefulness in his employment. *Chase v. Maine Cent. Ry. Co.*, 77 Me. 62, 52 Am. 744; *Scott v. Hale*, 16 Me. 326; *Morris v. East Haven*, 41 Conn. 252; *Gardner v. Ry. Co.*, 17 Ill. App. 262; *R. R. Co. v. Stebbing*, (Md.) 19 Amer. & Eng. R. Cas. 36, 49 Am. Rep. 628; *R. R. Co. v. Newbern*, Id. 261; *McDonald v. Savoy*, 110 Mass. 49; *Baldwin v. R. R. Co.*, 4 Gray, 333; *Tenney v. Tuttle*, 1 Allen, 185; *Gahagan v. R. R. Co.*, Id. 187; *Bryant v. R. R. Co.*, 56 Vt. 710.

The only cases where such evidence has been admitted are where there were no eye-witnesses of the accident and no evidence bearing directly upon the negligence or want of negligence of the person injured at the time of the injury. In such cases some courts have held that a presumption of due care will be indulged from the known instinct of self-preservation, or upon proof of the habits and reputation of the party for carefulness. *Chicago, etc., Ry. Co. v. Clark*, 108 Ill. 113, 15 Amer. & Eng. R. Cas. 261; *Cassidy v. Angell*, 12 R. I. 447, 34 Am. 690; *Louisville, etc., R. R. Co. v. Gatz*, 79 Ky. 442, 19 Amer. & Eng. R. Cas. 358, note.

This case is not within the exception, and, this evidence having been submitted to the jury without any direction to disregard it, the presumption is that the defendant was prejudiced. *Yankton County v. Rossteuscher*, 1 Dak. 125, 130; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 460; *Baird v. Gillett*, 47 N. Y. 186; *State Bank v. Dutton*, 11 Wis. 371; *Johanneson v. Borschenius*, 35 Wis. 131; *Rooney v. Chair Co.*, 65 Wis. 397, 27 N. W. Rep. 24.

Grigsby & Lyon, for respondent.

As to there being no negligence on the part of the defendant. It appears the deceased had undoubtedly seen the engine and a long train of cars come down the main track. As soon as they had passed, he discovered that two box-cars had been thrown down the side track, and were liable to run into his men and the hand-car. His attention was then necessarily fixed upon them. And the only rational explanation of his conduct is that at the moment he was killed he had become convinced that his men and the defendant's hand-car were in danger, and he was doing what any faithful employe should have done,—rushing over to save them from injury. The evidence is conflicting as to the rate of speed of the detached cars, but it is evident that in the excitement of the moment all estimates as to speed and distance were unsatisfactory; but from the facts it is evident the cars must have been coming at a very rapid rate of speed in order to overtake the deceased. There was no employe stationed on the front part of the car that struck deceased, or upon any of those cars, in order to apply the brakes, or give warning to any one who might be upon the track.

A rule of the defendant prohibited flying switches except at spur sidings. This was not a spur siding, and the prohibition was absolute. It was the duty of the deceased as well as the conductor to keep a copy of the rules, and he must therefore be presumed to have known and acted on it. It is evident that a flying switch, made under the circumstances, would be evidence from which a jury could infer negligence on the part of the conductor, even if there would have been no negligence in making a flying switch not prohibited by the rules.

The cases cited from Iowa, Wisconsin, and Illinois are not in point. Wherever the question has been decided it will be found that the authorities almost if not without exception hold that a flying switch is evidence of negligence, if not negligence *per se*. See 1 Thomp. Neg. 423, 452, and cases cited.

The cases fail to sustain the position that the accident arose from the ordinary risks of the business.

That the conductor and deceased were not co-employees, see *R. R. Co. v. Moranda*, 93 Ill. 302; *Garrahy v. R. R. Co.*, 25 Fed. Rep. 258; *Gilmore v. R. R. Co.*, 18 Fed. Rep. 870; *Quinn v. Co.*, 23 Fed. Rep. 363; *The Titan*, Id. 413; *Au v. R. R. Co.*, 29 Fed. Rep. 72; *King v. R. R. Co.*, 14 Fed. Rep. 277; *Hobson v. R. R. Co.*, 11 Pac. Rep. 545; *R. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590; *C., M. & St. P. Ry. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184. In this case the court lays down the general proposition "that the conductor of a railway train, who commands its movements, directs when it shall start, at what station it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible."

This case is in line with *Cowles v. R. R. Co.*, 84 N. C. 309; *R. R. Co. v. Bayfield*, 37 Mich. 205; *Whalen v. Centenary Church*, 62 Mo. 326; and decisions in Ohio and Kentucky,—and is decisive of the case at bar.

It is true, it is the duty of one to look and listen for trains at a safe distance from the railway track. This precaution was taken by the deceased. See the leading case on this subject, *Bonnell v. R. R. Co.*, 39 N. J. L. 189.

There is no evidence that the deceased did not look and listen before approaching the track, without being able to see that the rear cars were thrown down the main track. If from the evidence there was room for doubt whether the deceased looked or not, it was properly a question for the jury. *R. R. Co. v. Weber*, 76 Pa. St. 157, 18. Amer. Rep. 407.

But, even if the uncontradicted evidence conclusively showed that the deceased did not look and listen, the plaintiff would still be entitled to recover upon three grounds:

1. Where a traveler about to cross a railroad track has seen

an engine attached to cars pass by, he has a right to suppose that the danger has passed; and if he then steps upon the track, and is injured by detached cars running of their own momentum, and without a watchman stationed thereon to give warning of the danger, the question of negligence must be submitted to the jury. *R. R. Co. v. Troutman*, 6 Amer. & Eng. R. Cas. 117; *R. R. Co. v. Hedges*, 7 N. E. Rep. 801, 802, 805; *Farley v. R. R. Co.*, 56 Iowa, 337, 9 N. W. Rep. 230; *Butler v. R. R. Co.*, 28 Wis. 499; *Ferguson v. R. R. Co.*, 23 N. W. Rep. 123; *French v. R. R. Co.*, 116 Mass. 537; *Brown v. R. R. Co.*, 32 N. Y. 600; *Ryan v. R. R. Co.*, 37 Hun. 186.

2. The deceased, in his employment, had never known of a train broken apart and thrown down the track in that manner before. His duty to the defendant rightfully called him upon the track, and his attention was necessarily required in the direction of his men and the rapidly moving cars upon the side track. *Ominger v. R. R. Co.*, 4 Hun, 159; *Crowley v. Ry. Co.*, 65 Iowa, 658, 20 N. W. Rep. 467; *Mark v. Ry. Co.*, 32 Minn. 208, 20 N. W. Rep. 131; *Goodfellow v. R. R. Co.*, 106 Mass. 461; *Shelby v. R. R. Co.*, 3 S. W. Rep. 157; *R. R. Co. v. McLaughlin*, 119 U. S. 566, 573, 579, 7 Sup. Ct. Rep. 1366.

3. Plaintiff's evidence tended to show that the injury was the result of wanton or willful neglect on the part of the conductor; and therefore the plaintiff was entitled to recover, even if the deceased was guilty of contributory negligence. 2 Thomp. Neg. 1160; *Shelby v. Ry. Co.*, 3 S. W. Rep. 157.

That the evidence relating to the deceased's habits of care was admissible, see *Shear. & Redf. Neg.* § 43; 53 Vt. 183; *Stokes v. Saltonstall*, 13 Pet. 181; *Ficken v. Jones*, 28 Cal. 618; *Hobson v. R. R. Co.*, 11 Pac. Rep. 545; *R. R. Co. v. Brooks*, 57 Pa. St. 339. See, also, *R. R. Co. v. Clark*, 108 Ill. 113, 15 A. & E. 261; *Cassidy v. Angel*, 12 R. I. 447, 34 A. R. 690; *R. R. Co. v. Goetz*, 79 Ky. 442, 42 A. R. 227; *Burns v. Ry. Co.*, 30 N. W. Rep. 25, 28; *Gay v. Winter*, 34 Cal. 153, 164; *Johnson v. R. R. Co.*, 20 N. Y. 65, 73, 74; *R. R. Co. v. Stebbing*, 19 A. & E. 36, 40; 2 Thomp. Neg. 1179; 19 A. & E. 358, note.

But, even if such evidence were inadmissible, it would be error without prejudice. *Brakken v. Ry. Co.*, 32 Minn. 425, 21 N. W. Rep. 414; *Shear. & Redf. § 44*; *Burdick v. Haggard*, 22 N. W. Rep. 589.

SPENCER, J., (*after stating the facts as above.*) This action was brought by the plaintiff to recover damages for the death of her husband, John Elliot, alleged to have been caused by the negligence of the defendant's employes. The deceased, at the time he received the injuries which resulted in his death, was in the employment of the defendant on its line of railway as a section foreman at a station called Meckling. On November 1, 1884, a freight train was approaching this station from the west, in charge of a conductor, assisted by an engineer, fireman, and others, and as it neared this station was, during the process of making a flying switch, divided into three sections, the first of which, consisting of the engine and a number of cars, passed down the main track. Some of the other cars were put upon a side track; and then the rear section of the train, consisting of four cars, including the caboose and passenger coach, was also moved down the main track. About the time the first section of the train passed down, the deceased was standing a short distance south of the main track, and, after it had passed him, he undertook to cross that track diagonally in an easterly direction, and was struck by the rear section of the train, and instantly killed. There was no evidence showing that the conductor was not a fit person for the service that he was employed in, nor was there any evidence showing that the deceased had received any order from, or was doing any act by direction of, the conductor or other person connected with the train. At the close of the evidence counsel for the defendant moved the court to direct a verdict for the defendant upon several grounds, and, among others, that if the evidence tended to show negligence, it was the negligence of co-employes of the deceased, engaged in the same general business, for which no recovery could be had under section 1130 of the Civil Code. This motion was overruled, and

the defendant excepted. The court then charged the jury, and, among other things, instructed them as a matter of law that the deceased and the conductor of this freight train were not co-employees within the purview of this statute, and to this instruction the defendant also excepted. The case was submitted to the jury, who returned a verdict in favor of the plaintiff. The defendant duly moved for a new trial upon the grounds presented by said motions and exceptions, and others, which was denied. Judgment upon the verdict was entered for the plaintiff, and the defendant appealed.

The general and well-established principle of the common law, that an employer is not liable to one of his agents or servants for the negligence of another of his agents or servants engaged in the same general business, has been ingrafted in, and forms part of, the statute law of this territory, and hence, in the consideration of the question presented by the exceptions of the defendant to the ruling of the court above alluded to, we have only to determine whether the deceased and the conductor of the freight train aforesaid were co-employees of the defendant, engaged in the same general business, within the meaning of this statute. The statute does not undertake to define who are co-employees, or what is intended by the term "same general business," but merely declares the general rule of law as to the non-liability of an employer to his agents and servants in the cases mentioned, leaving it for the courts to determine when persons are co-employees, engaged in a common business. The question thus presented has frequently been considered by the courts of this country and England, and to the adjudications upon this subject we may turn for such explanation of this term as they may yield, and as demonstrating under what circumstances this rule has been applied. A general collection of all the authorities on this subject at this time would be impracticable, and is not necessary; but a few, selected from the many, as showing the current of authority, and the general application of the principle, will be all-sufficient. It was decided as early as 1841, in South Carolina, that a section foreman who was injured

by the negligence of an engineer could not recover against their common employer for the injuries thus sustained, because they were co-employees of a common master, engaged in the same general business. *Murray v. Railroad Co.*, 1 McMul. 385. Soon after, it was determined by the supreme court of Massachusetts that an engineer who was in the employ of a railroad company, and was injured by the negligence of a switch-tender, could not recover damages against the company, the negligent employee being also in its employ. *Farwell v. Railroad Co.*, 4 Metc. 49. This decision has since been followed by the courts of that state, and the doctrine applied where a brakeman was injured by the negligence of a trackman, (*Holden v. Railroad Co.*, 129 Mass. 268,) and in *Clifford v. Railroad Co.*, 141 Mass. 564, 6 N. E. Rep. 751, where the injuries were sustained by a section-man, and were occasioned by the negligence of an engineer, both in the service of the company. The courts of New York have held a similar rule, and applied it in the instances following: Where a section-man was injured by the negligence of a train-man, (*Coon v. Railroad Co.*, 5 N. Y. 492;) where a brakeman was injured through the carelessness of an engineer, (*Boldt v. Railroad Co.*, 18 N. Y. 432;) where a shoveler was injured by the negligence of train-men, (*Henry v. Railroad Co.*, 81 N. Y. 373;) where a fireman was killed because of the negligence of a switch-man, (*Harvey v. Railroad Co.*, 88 N. Y. 481.) In Illinois, the rule was applied in the case of a car-repairer injured by the negligence of an engineer, (*Valtez v. Railway Co.*, 85 Ill. 500;) and in Pennsylvania, in the case of a section-man and engineer, (*Keyes v. Pennsylvania Co.*, 3 Atl. Rep. 15;) in Wisconsin, in the case of a shoveler and conductor, (*Heine v. Railroad Co.*, 58 Wis. 525, 17 N. W. Rep. 420;) in Minnesota, in the case of an engineer and station agent, (*Brown v. Railway Co.*, 31 Minn. 553, 18 N. W. Rep. 834;) in Indiana, where a section-man was injured through the negligence of an engineer, (*Gormley v. Railway Co.*, 72 Ind. 31;) and, also, where a track-man was injured by negligence of an engineer, (*Capper v. Railroad Co.*, 103 Ind. 305, 2 N. E. Rep. 749;) and in many of the other states.

In all of them where the subject has been considered by the courts, except Tennessee, the rule has been applied in like cases; and, finally, the United States supreme court, in the case of *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322, has held it to be the established law, and applied it to the case where a switchman was injured through the negligence of an engineer. In the latter case Mr. Justice GRAY delivered the opinion of the court, and in discussing the relations of these persons, and whether they were engaged in a common business, used the following language: "They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object, the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury, caused by such negligence, against the corporation, their common master." This opinion was concurred in by all the members of the court, and would seem to be decisive of the question under consideration. In the case at bar the character of the labor which the deceased was engaged to perform required him to be on and about the track to keep it in proper condition for running trains over it, and placed him in a situation where he was liable to be injured by passing trains. All of the duties which he was employed to perform necessarily required his presence on the track, and all the risk to which he was exposed arose from the nature of the employment which he took upon himself.

Some of the cases differ as to the reason of the rule, but there is no conflict of opinion as to its application to employes of a common master, at work for the accomplishment of a single purpose. It is sufficient within these cases to command the application of the rule, if the end to be obtained by the labor of the several employes under a common master is the same, to con-

stitute them fellow-servants engaged in the same general business, though the services rendered may be different in kind, and rendered separately and independently of each other. It was in this manner, and for the achievement of a common purpose,—the moving of trains over defendant's road,—that the conductor of this freight train and the deceased were employed. Both were in the employ of and paid by the same master, both were engaged in the service of operating a railroad,—the conductor in managing trains passing over the road, and the deceased in keeping such road in repair and condition for the transportation of trains over it,—both receiving orders from some officer of the defendant superior to either. Neither performed his work under the direction of the other, nor was he under the control of the other. From the character of the duties each had to perform in promoting the common object of their employment, they were brought together as co-employees, neither being superior to nor representing the common employer more than the other. True, one of the rules of the defendant, which was put in evidence, provides that in case of accident or delay track foremen shall obey orders from the conductors, but there is no evidence showing that the deceased had received or was executing any orders from the conductor of the freight train, or other person connected with it; on the contrary, the reasonable presumption from all the evidence and circumstances is that he had not received any orders from the conductor, and that his act in crossing the track was entirely voluntary on his part. The counsel for the respondent has argued with much ingenuity that the general rule of law as it has been heretofore understood has been so modified by the decision of the court in the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, as permits a recovery by the plaintiff in this suit. We do not think that the decision in that case supports plaintiff's position. It modifies and limits to some degree the extent to which the rule is applicable, and holds, substantially, that an employe of a railroad company may, under some circumstances, and as to some persons, become a representative of his employer to such an extent as to render his prin-

cial liable for his negligent acts; and that a conductor of a railroad train, having a right to command its movements and control the other persons employed upon it, as to such persons may cease to be a fellow-servant while he remains in charge of such train, and may, under some circumstances, during such time, become a representative of the company. This decision modifies the rule as laid down in *Sherman v. Railroad Co.*, 17 N. Y. 153, and other like cases. But we do not understand it overrules the general rule of law that where several persons are employed in the same general service, by a common employer, and one is injured by the negligence of the other, the employer is not responsible. The facts and circumstances of that case were unlike the case at bar. There the conductor was charged with a special duty, which it was incumbent upon his employer to perform, and which he neglected to render. The engineer, the injured person, was subject to his command. Here it is expressly proven, and uncontradicted, that the conductor had no authority or control over the deceased. He was, not, then a superior over the deceased, and, as to him, did not represent the defendant. The case of *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, also relied upon by the respondent, is not applicable here. That case decides that under section 1131 of the Civil Code a railroad company is liable to one of its employees—a brakeman—for the negligence of another employee—a car-repairer—in failing to keep in proper repair certain appliances used by the injured person in the transaction of the business of the company, which he was employed to do, and he was held not to be in the same business as the brakeman, who was injured by the use of a defective car. It was the duty of the company to provide safe machinery and appliances. The facts in these cases, and the grounds upon which the decisions rest, are clearly inapplicable to support respondent's position here, nor do they militate against the doctrine laid down in *Randall v. Railroad Co.*, *supra*, though the decision in the *Ross Case* was made subsequently.

The case of *Garrahy v. Railroad Co.*, 25 Fed. Rep. 258, as

reported, would seem to support respondent's position here. But in this regard it is apparently in conflict with *Randall v. Railroad Co.*, *supra*, though the learned judge who wrote the opinion in the former concurred in the decision in the latter, in which the court was unanimous; and the law as there pronounced must be taken and accepted as the law of this territory. Several other decisions of the circuit courts have been cited by respondent as sustaining his view, but upon examination it will be found that they all proceed upon the doctrine of superior authority or control of one employe over another, or upon the negligence of the employer or person charged by him with the performance of a duty owing to the employe.

There is no pretense in the case at bar that the appellant failed to discharge any duty owing by it to the deceased, or that the company was negligent in the employment of, or retention in its service of, the conductor who had charge of the train. It is not, therefore, within the purview of section 1131, nor within the exception to section 1130. On the contrary, it comes directly within the exemption defined by section 1130, and within the doctrine of the common law, as stated in *Randall v. Railroad Co.*, *supra*. Since the decision in the *Garrahy Case* the question here involved has been before several of the circuit courts of the United States, and the decision in the *Randall Case* adhered to and followed. Thus, in *Van Wickle v. Railway Co.*, 32 Fed. Rep. 278, it was held that a track repairer and an engineer were co-employes, and that the company was not liable to the former for an injury resulting from the negligence of the latter. Coxe, J., in his opinion, after referring to the *Garrahy Case*, says: "Recognizing the marked lack of unanimity among the decisions, it may still be confidently affirmed that the proposition that persons holding the relation that this plaintiff and the engineer held to each other are fellow-servants is maintained by a great preponderance of authority," and in support of this view he cites *Randall v. Railroad Co.*, *supra*; *Boldt v. Railroad Co.*, *supra*; *Vick v. Railroad Co.*, 95 N. Y. 267; *Brick v. Railroad Co.*, 98 N. Y. 211; *Quinn v. Lighterage Co.*, 23 Fed. Rep.

363. So in *Easton v. Railway Co.*, 32 Fed. Rep. 898, the United States circuit court, in Texas, made a similar ruling; PARDEE, J., in his opinion, using the following language: "As federal authorities sustaining the finding of the master I have been referred to the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, which holds that 'a conductor of a railroad train, who has the right to command the movements of the train, and to control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow-servant to the engineer and other employes of the corporation on the train;' and to the later case of *Railroad Co. v. Herbert*, 116 U. S. 648, 6 Sup. Ct. Rep. 590, where it was held that a brakeman and the officer or agent of the company charged with the duty of keeping the cars in repair were not fellow-servants within the common-law rule. These cases were decided by a divided court. In the case of *Ross* the vice-principal doctrine is recognized, and in the case of *Herbert* the fellow-servant negligence rule is modified by limiting the application of the rule to employes in the same department of service; and under this latter authority I can well see how the master might conclude in this case that, as the section hand and the locomotive engineer are in separate departments, they are not fellow-servants assuming the risk of each other's negligent acts. I am, however, of the opinion that neither of these cases is applicable to the facts of the present case. Whatever may be, as a general rule, the duties of the section hand, as distinguished from the duties of those railroad employes running trains and locomotives, at the time of the complainant's injury he was running a car on the road, and his duty and employment brought him in direct connection and relation with the employes running the special train causing the injury. Both were using the tracks of the railway at the same time, and so near to each other that the conduct of the one necessarily affected the comfort and safety of the other. At that time, it seems to me, they were fellow-servants in the same general department, governed by the same rules, and respectively charged with the ordinary risks of

each other's negligent acts. The case of *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322, by a unanimous court, seems to me to be directly in point." And again, in *Naylor v. Railroad Co.*, 33 Fed. Rep. 801, the circuit court of the Northern district of New York held that an engineer and switchman were fellow-servants. WALLACE, J., said: "The switchman and the deceased engineer were not only co-employees of the defendant, but they were each engaged in duties which brought them to work at the same place, at the same time, under circumstances in which the carelessness of one might be fatal to the safety of the other." The decision in each of these cases was placed upon the authority of *Randall v. Railroad Co.*, *supra*.

Upon reason and authority, therefore, we are of opinion in the case under consideration that the conductor and the deceased were co-employees, and engaged in the same general business, and that the trial court erred in holding otherwise.

2. Did the negligence of the deceased contribute to the accident which resulted in his death?

James Kennedy, one of the witnesses sworn in behalf of the defendant, testified as follows: "We commenced pushing the car out of the way of the approaching car that was coming onto the side track. We commenced pushing, and the next thing I heard Mr. Elliot holler. I thought it was him. * * * When Elliot hollered to me he was 10 or 12 feet west of the car-house. At that time I was right opposite on the side track, —right across from him. * * * The train was coming from the west. They made what I should call a 'flying switch,' to the best of my judgment. Part of the train came down the main track with the engine, and part came in on the side track, and another part came on the main track. The last part was the part that struck Elliot. I saw the train after it struck him. I helped get him out from under the cars. It was the last section that struck him, —the last part on the main track. The first part was on the main track, and the middle part was sent off on this side track."

H. C. Smith, a witness for plaintiff, also testified as follows:

"I was acquainted with Elliot; worked under him in his gang about seven months. I was present the morning this accident occurred. Just before the accident, Elliot and I were talking, about twenty-five feet west of the car-house, before the train came down, and when the engine went by us I started west and he started east. He got as far as ten or fifteen feet from the car-house, when he stepped across the track. I should judge that is about as far as he got. I went west towards the depot. I did not go on the depot platform until I looked around, and saw a man under the train. I did not know it was him at the time. I did not see him struck. * * * When Elliot and I were talking we were not on the track. We were on the south side, four or six feet from the track. I mean that he crossed from the south side to the north side. I saw him cross the south rail. I did not pay any attention whatever. I thought he got across all right.

"Cross-Examination. This accident was a little after eight o'clock in the morning. It was a clear morning. There was nothing on the track to obstruct the view from where I and Elliot stood by the track. At the time we were standing there I knew this train was in, or about in. While I was standing there with Elliot, the front part of the train pulled past me, down to the east. I did not notice any cars attached to the engine in the front part. I would not be positive of that. I recollect two cars set in on the south track. I don't know what the men on the hand-car were doing while Elliot and I were standing there. I did not notice them doing anything during that time. Just before that, I was running with the section force. I had another man in my place that day. I belonged with the force. I was going away that day, and was talking with Elliot just before leaving to go down and get on the train. The first that I noticed the rear end of the train coming down the track was just as it ran in on the switch, coming in on the main track, the rear end of it, after the car went in on the side track, and as I turned and left Elliot to come up towards the depot. It was about opposite to the depot when I started to go west. As I went west

towards the depot it came down the track, and immediately passed me. The last I saw of Elliot before the accident happened was when I turned to look and he was just in the act of stepping over the south rail. At that time he was across the south rail. I saw him. He was stepping across. At that time I was ten or fifteen feet from where I was talking with him. The last I saw of Elliot he was stepping across the rail. At that time the train must have been most down to Elliot. I should judge the car was about twenty-five or thirty feet from Elliot when he crossed the rail. The last I saw of Elliot before the accident was at that time. This was the front car of the rear part of the train. It was on the main track."

Charles M. Taylor, sworn for plaintiff, testified: "There were at that time no buildings between the depot and car-house, on the map here, about two hundred feet east of the depot. The ground is level,—the whole station ground. It is pretty near level for six miles west and four miles east. It is level, you might say, all the way,—only one foot between there and Gayville,—six miles. The road is straight for about six miles west. Standing down here by the car-house, looking west, the ground is level,—plain to be seen. There is nothing to interrupt the view from the car-house up above the west switch. It was a pleasant morning. Don't recollect whether it was sunshiny or cloudy. We could see all around,—a good, bright morning."

W. J. Welsh, sworn for defendant, testified: "The first I saw of Elliot he was on the main track. He was running slowly, angling on the track,—crossing the track at an angle. The front end of the rear section of the train at that time I should judge was about half a car-length from him. As soon as I saw him I hollered to him to get off. I told him to get off the track, or he would get run over. I did not have time to say it a second time, when the car struck him."

This is substantially all the evidence in the case throwing any light on the conduct of the deceased at the time of the accident, and it shows conclusively, and is undisputed, that the morning on which the accident occurred was clear; that the

track for several miles in either direction from the place of accident was straight, and the view unobstructed; that the deceased attempted to cross the main track with the rear section of the train—the one which ran upon him—in full view, and not more than 25 or 30 feet from him; that it was in motion; and that he was crossing the track diagonally, with his back turned partly towards the rear section of the train. There is no pretense that he looked or listened. The conclusion from the evidence is irresistible that he did not look or listen before the attempt to cross the track; or, if he did, that he voluntarily, and with full knowledge of the danger he was incurring, unnecessarily placed himself in a position of peril and immediate danger. In either event, his negligent conduct in this regard—failing to know of the hazard he was taking upon himself, when to have had actual knowledge of it he had only to look or listen; or, knowing of the danger, deliberately and of his own volition unnecessarily assuming such risk—was negligence which, under the circumstances, must inevitably have contributed to the injury complained of. *Railroad Co. v. Donahue*, 75 Ill. 106; *Ernst v. Railroad Co.*, 39 N. Y. 61; *Weber v. Railroad Co.*, 58 N. Y. 451; *Railroad Co. v. De Pew*, 40 Ohio St. 121; *Simmons v. Railroad Co.*, 110 Ill. 340; *Railroad Co. v. Jones*, 95 U. S. 489.

Nor was it any excuse for the failure of the deceased to look and listen that the defendant was making with its train what is known as a "flying switch." It was his duty, nevertheless, to have exercised his ordinary faculties to ascertain if there was danger in the attempt to cross the track, and, if there was, to desist. *Ormsbee v. Railroad Corp.*, 14 R. I. 102; *Grethen v. Railroad Co.*, 22 Fed. Rep. 609; *Haley v. Railroad Co.*, 7 Hun, 84; *Myers v. Railroad Co.*, 113 Ill. 386, 1 N. E. Rep. 899.

It is doubtless a well-established rule of law that the question of concurrent negligence ought generally to be submitted to the jury. *Poler v. Railroad Co.*, 16 N. Y. 476; *Keating v. Railroad Co.*, 49 N. Y. 678; *Butler v. Railroad Co.*, 28 Wis. 487.

But when the facts are undisputed, and contributory negligence is established, the question becomes one of law, and the plaintiff may be nonsuited, or a judgment given for the defendant. *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Railroad Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125; *Morrison v. Railroad Co.*, 56 N. Y. 302.

The evidence in this case is incapable of but one construction,—that the negligence of the deceased contributed to the injury complained of. The court should therefore have granted defendant's motion, and directed a verdict for the defendant.

Upon the trial of the cause the plaintiff was permitted, against defendant's objection, to ask several of the witnesses sworn in his behalf the following question: "Was Mr. Elliot a careful or a careless man in guarding himself and employes from danger from passing trains?"—to which it was usually answered that he was a careful man. We think that the trial court erred in overruling appellant's objection to this question, and permitting the witnesses to answer. It was an important issue in the case whether the negligence of the deceased contributed to the injury. The correct determination of this question could not be made to depend upon the fact of whether the deceased was usually careful or careless, but upon his conduct at the time of the accident. However careful he may have been generally would be of no avail to him if his negligence in fact contributed to the injury, and however careless he may have been usually would not have been any defense to this action had he been free from negligence at the time the accident occurred. *Chase v. Railway Co.*, 77 Me. 62; *Morris v. East Haven*, 41 Conn. 252; *Railroad Co. v. Stebbing*, 49 Amer. Rep. 628; *McDonald v. Savoy*, 110 Mass. 49.

There are some cases holding that such evidence is proper when there were no eye-witnesses of the accident, and no evidence in regard to the negligence or want of negligence of the person injured at the time of the accident. These cases proceed upon the theory that courts will presume upon proof of general habits of carefulness, or the contrary, when from the nature of things it is

impossible to obtain better evidence that the injured person was or was not negligent at the time of the accident which resulted in the injury; or, from the natural instinct of self-preservation, sought to save himself. *Railway Co. v. Clark*, 108 Ill. 113; *Cassidy v. Angell*, 12 R. I. 447. But this rule has never been extended to any case when there were eye-witnesses to the accident. The facts in these cases are entirely dissimilar to those in the case at bar, and the doctrine there enunciated is not applicable. This evidence was submitted to the jury without explanation, or direction to disregard it, and it is obvious that the defendant may have been prejudiced by it, and that the jury may have attached great importance to it. For these reasons the judgment of the court below must be reversed, and a new trial ordered. All the justices concurring, except Justice PALMER, dissenting.

ON REHEARING.

Upon the petition of the respondent a reargument of the appeal in this action was ordered, and the case reheard at the May term, 1888, at Yankton. The *personnel* of the court had changed somewhat since the former argument; Judges PALMER and FRANCIS having retired, and been succeeded by Judges CARLAND and ROSE. After such reargument, the court filed the following memoranda in the cause:

PER CURIAM. Upon a reconsideration of this case we are unable to discover any reason for change in the conclusion arrived at upon the former argument, and as announced in the opinion of the court by Mr. Justice SPENCER. For the reasons in said opinion stated, the judgment appealed from must be reversed, and a new trial ordered. All concur.

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ADVERSE POSSESSION.

See *Indians*, 2.

AGENCY.

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APPEAL.

See, also, *Certiorari*.

Appellate Jurisdiction.

1. Under section 46, c. 21, Pol. C., allowing appeals to the district court "from all decisions of the board of county commissioners," an appeal will lie from the decision of such board, though sitting as a board of equalization, under section 28, c. 28, Pol. C., providing that "the board of county commissioners of each county shall constitute a board of equalization," etc.—*Pierre Water-Works Co. v. Hughes County*, 145.

2. The decision of a board of county commissioners, in refusing to reduce an assessment, is sufficiently judicial in its character to sustain an appeal under section 46, c. 21, Pol. C., allowing appeals to the district court "from all decisions of the board of county commissioners."—*Id.*

3. An appeal will not lie from the order of a district judge restraining the foreclosure of a chattel mortgage by advertisement. If it were reviewable as affecting a substantial right, it would first be necessary to move the court for its vacation, and appeal from the order of the court refusing so to do, under subdivision 5, § 23, c. 20, Laws 1887, providing for appeals from orders of the district court vacating or refusing to set aside orders made at chambers in case such order would have been appealable if made by the court.—*Bostwick v. Knight*, 805.

4. A party desiring to review an order in such a case must have, settled and allowed by the judge, a bill of exceptions relating thereto, or there will be no record on which the supreme court can act, and the appeal will be dismissed.—*Id.*

5. In an action before a justice of the peace, the defendant, by his attorney, on the return-day appeared and had the case continued to another time, when he again appeared and filed an answer of general denial, but the defendant himself failed to appear within the hour and until after judgment had been rendered against him. *Held* not a judgment by default, and that the defendant might appeal therefrom and have the case tried in the district court.—*Harris v. Watkins*, 374.

6. Section 96, Justice's Code, as amended, chapter 5, Laws 1881, provides that if the appeal is not filed with the clerk of the district court within 15 days after it is perfected, it shall be dismissed. It appeared the clerk received the papers within the time, but, his costs not having been paid, did

not indorse them with his filing until after the time had expired. *Held*, that the district court had acquired jurisdiction and it was error to dismiss the appeal under that section.—*Id.*

7. The denial of an application for a change of venue, based upon the ground that an impartial trial cannot be had in the county where the action is pending, is appealable, as being an order involving the merits of the action within sections 23, 24, c. 20, Laws 1887.—*White v. Chicago, M. & St. P. Ry. Co.*, 508.

8. Such an application being addressed to the discretion of the court, and the judge having the right to resort to his personal knowledge with reference to the matter, nothing short of an abuse of discretion will authorize an appellate court in interfering with the order made.—*Id.*

Practice.

9. An assignment, "the court erred in admitting evidence at the trial against the objection and exception of the appellant," is improper for not stating in what the error consisted, or pointing out the evidence, the admission of which it is claimed was error.—*Franz Falk Brewing Co. v. Mielenz*, 186.

10. An assignment, "the court erred at the trial in excluding evidence offered by appellant, and to the exclusion of which appellant duly excepted," is improper as not pointing out what evidence was excluded, to the exclusion of which it is claimed there was error.—*Id.*

11. It is not only necessary to allege error on the part of the court in doing the act complained of, but there must be some ground stated as the basis of the allegation, and it must be specifically and definitely set forth in the assignment, so as to show in what way an error was committed.—*Id.*

12. An assignment of error means the marking or pointing out of the error.—*Id.*

13. An assignment of error will not be considered that was not relied upon or mentioned by the appellant in his argument before the court.—*Id.*

14. An assignment, "the court erred in overruling and denying appellant's motion to set aside the verdict and for a new trial," disapproved. It is not such an assignment as the court is bound to notice.—*Id.*

Review.

15. A finding of the trial court upon conflicting testimony will not be disturbed, even when it is against the weight of evidence.—*Phillip Best Brewing Co. v. Pillsbury & Hurlbut Elevator Co.*, 62.

16. To determine whether or not a verdict is sustained by the evidence, this court, from the province of the jury, will not speculate or inquire how it would have viewed or acted upon the evidence. The only question to be answered is, is there any legal evidence upon which the conclusions embraced in it can be fairly reached? If there is, in a case where the evidence is conflicting, the verdict will not be disturbed; if there is not, it will be set aside.—*Franz Falk Brewing Co. v. Mielenz*, 186.

17. Though much suspicion is thrown upon the testimony of a witness by the circumstances and the testimony of others of equal means of information, still, where he was not impeached, swore positively to the facts, and no motive for false swearing appears, an appellate court will not disturb the verdict founded on his testimony when a new trial, on the ground of the insufficiency of the evidence to support the verdict, has been denied by the trial court.—*Pielke v. Chicago, M. & St. P. Ry. Co.*, 444.

18. Where there is a general verdict for the aggregate loss sustained by two negligent injuries, and the only error relied on is the charge of the court as to one, its correctness will not be determined, for the case could not be reversed, there being no error insisted upon as to the other injury sustained.—*Cady v. Chicago, M. & St. P. Ry. Co.*, 97.

19. Under C. C. Pro. § 23, empowering the court to modify the judgment appealed from, the amount erroneously awarded and embraced in the judgment must clearly appear from the record. Where the verdict was in the aggregate for two losses by negligence on different dates, and there being no way of determining the amount of the one respecting which only error was claimed, the judgment cannot be modified.—*Id.*

20. The appellate court will not consider the question of the admissibility

of testimony to which no exception has been taken.—*Territory v. Keyes*, 244.

21. In an action for the conversion of certificates of deposit, where, on the question of value, the court had improperly excluded the evidence as to the insolvency of the maker, at the time of the conversion, the appellant was not obliged to go further and show the insolvency of his indorser, to make it reversible error.—*First National Bank v. Dickson*, 286.

BAILMENT.

Liability of bailee, see *Railroad Companies*, 6, 7.

BANKRUPTCY.

Discharge, Effect of—Want of Notice to Creditors.

1. To an action for indebtedness the defendant pleaded and proved a discharge in bankruptcy, founded upon his petition filed after the existence of the debt provable in bankruptcy. *Heid*, under the U. S. R. S. §§ 5117-5120, that the discharge was a full and complete bar to the action, though it was found that the defendant willfully omitted from his list of creditors the names of the plaintiffs; that he knowingly and willfully concealed their names from the marshal, that notice might not be given them, in order that he might be adjudged a bankrupt, and procure his discharge; that the plaintiffs had no knowledge of the bankruptcy proceedings until nearly three years after the granting of the discharge.—*Sawyer v. Rector*, 110.

Collateral Attack.

2. In such case the discharge cannot be attacked collaterally. It must be contested in the court granting it, in an application to annul on the grounds of fraud, or by a direct proceeding in some other court having jurisdiction.—*Id*.

Nature of Proceedings.

3. Proceedings in bankruptcy relate to the estate of the debtor and its application to the payment of his debts, and are in the nature of proceedings *in rem*. The petition, schedule, and inventory required to be filed are only incidents in the course to be pursued in bringing his estate into court for adjudication.—*Id*.

Object of the Law.

4. The real object of the bankrupt law is to relieve the debtor from the burden of his debts when he surrenders his estate to the assignee for the benefit of his creditors.—*Id*.

Jurisdiction of Courts of Bankruptcy.

5. Whether the district court of the United States, acting as a court of bankruptcy, is one of general or limited jurisdiction, not determined; but, if it is of limited and special jurisdiction, the sufficiency of the proof upon which the court took its action is not open to collateral inquiry.—*Id*.

BANKS AND BANKING.

Authority of President and Cashier.

1. Where M., who went to a bank to identify W., at the request of the cashier wrote his name on the back of a draft, the cashier assuring him that he should not be held liable on it, his name being wanted merely to show who identified W., and M. afterwards gave his note to the bank for the amount of the draft it had cashed, with an understanding with the

cashier that his liability on the note should not be greater than it was on the draft, and he subsequently renewed this note with a similar understanding with the president and cashier, *held*, in an action by the receiver of the bank on the second note, (1) that M. would not be permitted to vary the terms of his liability as an indorser on the draft by parol; (2) that the facts constituted no defense, for the cashier and president had no authority to make any such contract.—*Thompson v. McKee*, 172.

2. The officers of a bank have no power to modify obligations on the faith of which the bank has parted with its funds.—*Id.*

CARRIERS.

Limitation of Liability by Notice.

1. In an action against an express company for the loss of a trunk, the defense being an omission to make a written claim within the time required by the shipping contract, or receipt, which was not signed by the consignor, the court charged the jury no written claim was necessary, and that, if they found that the plaintiff made a claim to the company's agent at the point where the trunk was shipped within the required time, and that the company had knowledge of the loss, they would be authorized in finding a verdict for the plaintiff. Section 1263, C. C., provides: "A consignor, * * * by accepting * * * a written contract for carriage, with knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated. But his assent to any other modifications of the carrier's * * * obligations contained in such instrument can only be manifested by his signature to the same." *Held*, under this section the defendant had no reason to complain of this charge.—*Hartwell v. Northern P. E. Co.* 468.

2. Bills of lading and contracts are not "special contracts" within the meaning of section 1261, C. C., providing that "the obligations of a common carrier * * * may be limited by special contract," unless they are signed by the consignor or consignee.—*Id.*

CERTIORARI.

Writ—Sufficiency.

1. Upon the affidavit of C. the district court, in the name of the territory, issued a writ of *certiorari* to a board of county commissioners to review their action in submitting to the voters of the county, under the "local option law," the question of prohibiting the sale of intoxicating liquors upon a petition alleged to contain the names of a less number of voters than required by the law. The writ charging the facts contained in the affidavit alleged that the said board, without a petition having been presented to them, signed by at least one-third of the legal voters of the county as shown by the last preceding general election, ordered an election to be held on the question of prohibiting the sale of intoxicating liquors in said county; that the said C. is beneficially interested in the result of said election, he being in the retail liquor business in a city of said county, and having property in said business that would be greatly deteriorated in value if said election was regular and proper; that he had applied to said city for a license to carry on said business, and had been refused the same because of the said election, and for no other reason. After return, and without a hearing on the merits, *held*, the court erred in quashing the writ on any of the following grounds: (1) It does not appear the board has exceeded its jurisdiction. (2) The writ fails to show on its face any case in which it ought to issue. (3) The writ is informal, defective, and insufficient. (4) Because the powers of the board in regard to the matters therein referred to have ceased. (5) The writ is not properly entitled. (6) It does not show C. a party beneficially interested, so as to entitle him to institute this proceeding. (7) There is a remedy by appeal. (8) The action complained of was ministerial.—*Champion v. Board of Co. Com.*, 416.

Review—Discretion.

2. Although this writ is discretionary, still its dismissal appearing not to be based upon discretion, the appellate court will examine the grounds thereof, and, if found insufficient, will reverse and remand for action on the merits, and an exercise of discretion.—*Id.*

Party Beneficially Interested.

3. The action complained of may be common in character, but, if it be special in amount or degree, the complainant is beneficially interested, within the meaning of the law.—*Id.*

Appeal.

4. Although this writ under section 685, C. C. Pro., cannot issue where there is a writ of error or appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy, and by section 46, c. 21, Pol. C., an appeal is given to any person aggrieved "from all decisions of the board of county commissioners," still the matter before the board in this case was such that jurisdiction could not have been conferred upon the district court to have heard it originally, and it could not take it by appeal. *Certiorari* was the only remedy.—*Id.*

CHATTEL MORTGAGES.

See, also, *Trover and Conversion*.

Right to Possession of Property.

1. In an action by a mortgagee to obtain possession of the chattels, as against another mortgagee thereof, he must show default in his mortgage, or such a state of facts as, under it, will entitle him to the possession.—*Madison National Bank v. Farmer*, 282.

Value.

2. In an action of claim and delivery by a third person against a mortgagee, where the latter has a verdict, it is the proper practice for the jury to find the value of the mortgaged chattels, rather than the value of the mortgagee's interest.—*Id.*

CLAIM AND DELIVERY.

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23.....	100.....	—	658.....	297.....	5472
92.....	276.....	4888	662.....	108.....	5476
119.....	504.....	4915	679.....	76, 77, 271.....	5501
128.....	85.....	4924	680.....	77.....	5502
129.....	87.....	4925	685.....	428.....	5507
261.....	53.....	5061	692.....	426.....	5514
650.....	184.....	5464			

JUSTICES' CODE.

96.....	378.....	6186
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PENAL CODE.

305.....	252.....	6505	322.....	252.....	6538
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CODE CRIMINAL PROC.

228.....	243.....	7252	537.....	248.....	7588
493.....	".....	7520			

CLOUD ON TITLE.

See *Public Lands*.

CONSTITUTIONAL LAW.

See, also, *Taxation*, 1.

Legislative Power.

1. R. St. U. S. § 1860, confers express power upon the legislature of the territory to prescribe the qualifications of voters.—*Farren v. Commissioners Buffalo Co.*, 36.

2. Chapter 70, Laws 1887, providing for the prohibition of the sale of intoxicating liquors in the several counties by local option, is not subject to any of the objections: (1) That it deprives the citizen of his property without due process of law. (2) That it conflicts with the Organic Act of the territory. (3) That it conflicts with the revenue laws of the United States, granting license to sell intoxicating liquors. (4) That it conflicts with the act of congress prohibiting the legislature from passing any law "impairing the rights of private property." (5) That it conflicts with the act of congress prohibiting local or special legislation. (6) That it conflicts with the act of congress in delegating legislative power.—*Territory v. O'Connor*, 397.

3. Such a statute is of a police nature, and a rightful subject of legislation within the power conferred by the Organic Act, and, being local in character, may be left to each county to determine when it shall be enforced therein.—*Id.*

4. Section 5 of the act provided that "in addition to the penalties now prescribed by law any person * * * who may sell any intoxicating liquors without a license having been duly granted as provided by law, or where the license is granted in violation of this act, shall be restrained from so doing by proper injunction." *Held*, on *habeas corpus*, where the petitioner had been arrested on a complaint before a justice of the peace charging him with selling intoxicating liquors in violation of the act, that the objection that the statute provided no penalties, and could not be enforced, was not well founded.—*Id.*

CONTRACTS.

See, also, *Homesteads*, 2; *Mechanics' Liens*, 3; *Statutes of Frauds*, 1, 2.

Rules as to Construction and Enforcement.

It is the policy of the law to sustain and enforce contracts when it can be done without violence to the language used, or the rules of construction; and when the language is equally susceptible of two or more constructions, that will be adopted which will sustain the contract, rather than the one that will destroy it.—*Series v. Sharlow*, 100.

CONVERSION.

See *Trover and Conversion*.

CORPORATIONS.

See *Municipal Corporations*.

COUNTY COMMISSIONERS.

See, also, *Certiorari*.

Appeal from, see *Appeal*, 2.

COVENANT.

See *Married Women*.

CRIMINAL LAW.

See *Mayhem*.

DAM.

See *Water and Water-Courses*.

DAMAGES.

See *Chattel Mortgages*, 2.

DEED.

See *Indians*.

DOMICILE.

See *Residences*.

DISTRICT ATTORNEY.

Changing salary, see *Office and Officer*, 2.

EJECTMENT.**Equitable Defense.**

1. Under the Code, equitable defenses may be interposed to an action of ejectment. It is also proper to dispose of such defenses first, and, if they are found in favor of the defendant, to discharge a jury from any consideration of the case.—*Suessenbach v. First Nat. Bank*, 477.

Evidence.

2. In such an action, on an issue of the equitable ownership of a mining claim, the admission in evidence of the rules of the mining district, and also the proceedings had in the land-office where the application to enter the claim was made, is proper as showing that by accident or fraud the legal title has not passed to the true owner.—*Id.*

ELECTIONS.

See *Voters and Elections*.

ERROR.

See *Appeal*, 15-21; *New Trial*.

ESTOPPEL.

See *Married Women*.

EVIDENCE.

See, also, *Master and Servant*; *Railroad Companies*.

Relevancy, see, *Ejectment*, 2; *Master and Servant*, 5; *Principal and Agent*; *Railroad Companies*, 6, 10; *Trover and Conversion*, 2, 8; *Water and Water-Courses*, 1.

Sufficiency, see *Appeal*, 15, 16, 17, 20, 21; *Trial*, 5, 6.

Parol, to Vary Indorsement.

1. Where M. indorsed a draft, without any words of explanation or limitation, under section 921, C. C., providing that the execution of a contract in writing supersedes all oral negotiations or stipulations that preceded or accompanied it, he will not be permitted to affect his liability as an indorser by showing that he merely identified the party that received the money; that he put his name on the back of the draft at the request of the cashier, who stated he wanted it for the purpose of showing who made the identification, and assured him (M.) he should sustain no liability thereby.—*Thompson v. McKee*, 172.

Relevancy.

2. In an action for the conversion of certificates of deposit, on the issue of value, it is proper to inquire of a person acquainted with the financial condition of the bank issuing them, whether or not, at the time of the conversion, the bank was solvent.—*First National Bank v. Dickson*, 286.

EXCEPTIONS, BILL OF.

Necessity of, see *Appeal*, 4.

EXECUTIONS.**Property Subject to Levy.**

The levy of an execution on a school-warrant of a judgment debtor prior to its receipt and acceptance by him creates no liability in favor of the plaintiff in the execution as against the school-district.—*Richardson v. Independent School-Dist. No. 1*, 277.

FINDINGS.

Omission of judge to sign, see *Trial*, 2.

Special findings, see *Water and Water-Courses*, 2, 3.

FRAUDS, STATUTES OF.

See *Statutes of Frauds*.

HOMESTEADS.**What Right Gives the Interest.**

1. Under the homestead law of Dakota, a person in possession of land with an agreement to purchase has an interest in the land to which a homestead right will attach against every one except the owner of the soil.—*Myrick v. Bill*, 167.

2. Where M., in possession of land, upon which he had made valuable improvements, writes the owner that he is desirous of purchasing the land, asking the price, and, receiving an answer, replies that the price is satisfactory; that he would forward the money; and asks when the deed would be ready,—*held*, an agreement to purchase.—*Id.*

Joinder of Wife in Conveyance.

3. Where the husband alone executed a bill of sale of two buildings,—a dwelling-house that he and his wife used as their home, and a store that he

used, in connection with the dwelling, in the prosecution of his ordinary business,—both situated upon a lot, of which he had an agreement to purchase, consisting of less than one acre, *held*, the buildings were a homestead, and under Pol. C. c. 38, § 3, the wife not having concurred in, or signed the bill of sale, it vested no title in the purchaser, and he could not recover in an action of claim and delivery against her.—Id.

Question of, How Determined.

4. The district court, on a motion to set aside a levy on a homestead, has no power, on affidavits, to determine the question of homestead. This should be decided in an action where the issue can be determined in the regular way. The words "proper case," in section 14, c. 88, Pol. Code, providing, "when any disagreement takes place between the owner and any person adversely interested, as to whether any land or buildings are properly a part of the homestead, it shall be competent for a district court, in any proper case, to determine such question, and all questions relating thereto," are synonymous with "proper action."—Dorsey v. Hall, 505.

HUSBAND AND WIFE.

See, Married Women.

INDIANS.

Conveyances of—Restraints on Alienation—Notice.

1. Lands acquired by Indians that would abandon their tribal relations, under 18 U. S. St. 420, were declared to be inalienable for five years. Such an Indian, having received a patent, which was in the usual form, without any reference to the statutory disability, or his being an Indian, executed a conveyance, within the five years, to B. *Held*, that the statute prevailed over the recitals of the patent, that purchasers must take notice thereof, and that the conveyance was void.—Taylor v. Brown, 335.

Adverse Possession—Good Faith—Color of Title—Sufficiency.

2. Under such deed, where the grantee knew his grantor was an Indian, there was no such good faith and color of title as is required for an adverse possession to defeat a subsequent conveyance.—Id.

INSTRUCTIONS.

See Jury; New Trial; Railroad Companies; Rape; Trial.

INTOXICATING LIQUORS, SALES OF.

See, also, Statutes.

Local option law, validity of, *see Constitutional Law*, 2, 3, 4.

License—City, Exclusive Right.

On an indictment for selling intoxicating liquors without a license from the county, it appeared the defendant had a license for the sale from the city where it occurred. Section 7, c. 26, Laws 1879, provided that it shall be lawful for the county commissioners of any county, and also the mayor and city council of any city therein, to require the payment of a license, and the granting of the power to license in any city shall not be held as conflicting with the provisions of this act; the intention being to allow both the county and city authorities to collect a license for the sale of intoxicat-

ing liquors. The city granting defendant the license was created by a special act, in which it was given power to license, regulate, or prohibit the sale of intoxicating liquors. *Held*, the city had not the exclusive right to license such sales.—*Territory v. Webster*, 351.

JUDGMENT.

Rendered Out of District—Nature—Proof.

When the record shows that the judgment was rendered in the district where the action was pending, *aliunde* statements in contradiction thereof will not be considered.—*National Tube Water-Works Co. v. City Chamberlain*, 54.

JURISDICTION.

Of courts, before patent, see *Public Lands*, 2.

Of foreclosure proceedings, see *Venue*, 1.

On appeal, see *Appeal*, 6.

JURY.

See, also, *Master and Servant; Railroad Companies; Rape; Trial; Trover and Conversion*.

Weight of Evidence.

In an action for the conversion of certificates of deposit of a national bank, on the issue of their value, the fact that prior to the conversion they had been protested for non-payment, without explanation of the cause, was evidence tending to show the insolvency of the bank, such as would preclude the court from directing the verdict.—*First National Bank v. Dickson*, 286.

JUSTICES OF THE PEACE.

Appeal from, see *Appeal*, 5, 6.

LICENSE.

Liquor licenses, see *Intoxicating Liquors*.

MANDAMUS.

See *Venue*, 1.

MARRIED WOMEN.

Mortgages—Covenants—After Acquired Title—Estoppel.

A married woman, who, in this territory, can enter into an agreement with reference to property the same as if unmarried, executed, with her husband, a mortgage containing general covenants of warranty to secure an obligation of which she was a joint debtor. After the mortgage, which, in Dakota, creates only a lien, had been foreclosed, and the mortgagee had obtained the sheriff's deed, the wife acquired title to the land. *Held*, under

such a mortgage deed the title inured to the benefit of the mortgagee, and as against him she was estopped from setting it up.—*Yerkes v. Hadley*, 324.

MASTER AND SERVANT.

Negligence of Master—Jury—Question for.

1. In an action against a railroad company, by a section-man, for injuries received in being struck by a switch-signal, it appeared that at the time of the accident he was on a train with his fellow-laborers and others, going to dinner, according to the usual method adopted by his foreman; that from the number on the platform he was obliged to stand on the bottom step, and, as the car passed the switch, which was leaning towards the track, he was struck on the back of the head; that he did not know of the switch; that it was constructed within four feet of the track; that such a switch was generally placed six feet from a track by all railroads; that this came in contact with passing cars when leaning towards the track. The court directed a verdict for the defendant company. *Held* error.—*Boss v. Northern Pac. R. R. Co.*, 308.

Negligence of Master—Sufficiency of Evidence.

2. Plaintiff, while in the service of the defendant in loading cars from a gravel-pit with which he was familiar, received injuries by a falling bank. It appeared the defendant's foreman, under whom the plaintiff worked, with notice to the plaintiff and the other laborers, went upon the bank, and tried to pry it down, but, not succeeding at first, the plaintiff returned, working at a point where he could see the foreman, and that he regarded safe, but he was afterwards caught by the falling bank. *Held*, there was no question of fact for a jury: (1) There was no negligence on the part of the defendant; (2) such an injury was one of the ordinary risks of the service in which the plaintiff engaged. *PALMER, J., dissenting.*—*Songstad v. Burlington, C. R. & N. Ry. Co.*, 517.

Fellow-Servants—Who are.

3. A section foreman and the conductor of a train are co-employees, within the meaning of the rule of the common law, and also section 1180, C. C., providing that an employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the negligence of another person employed by the same employer in the same general business.—*Elliot v. Chicago, M. & St. P. Ry. Co.*, 528.

Contributory Negligence—What amounts to.

4. In an action against a railroad company by a widow, to recover damages for causing the death of her husband through alleged negligence, it appeared a "flying switch," in violation of the rules of the company, was being made by the direction of a conductor of a train, and the deceased, in endeavoring to cross one of the tracks, was caught by the rear section of the train and killed; but it also appeared that he must have known the switch was being made, and that he could have seen this section had he turned and looked in its direction before stepping on the track. *Held*, the deceased was guilty of such contributory negligence as would defeat a recovery.—*Id.*

Evidence—Relevancy—Habits of Care.

5. On an issue of a deceased person's contributing to the negligent act causing the death, where there were eye-witnesses of the occurrence, the fact of his being a usually careful man is immaterial.—*Id.*

MAYHEM.

Premeditation not Necessary—Evidence—Instructions.

1. Under R. S. U. S. § 5848, against malicious mayhem, it is not necessary to prove premeditated design in order to constitute the offense, and a

request to charge that, in order to convict, the jury must find that at the time the defendant did the act he had a premeditated design or intention to do it, was properly refused.—*United States v. Gunther*, 234.

Indictment—Sufficiency.

2. An indictment, under R. S. U. S. § 5348, against mayhem, which charges the offense in the language of the statute, is sufficient. It need not state, "that by reason and means of the facts alleged therein said prosecutor was maimed and disfigured."—*Id.*

MECHANICS' LIENS.

Filing and Correction.

1. Under section 663, C. C. Pro., permitting a mechanic's lien to be filed with the clerk of the district court within 90 days after furnishing the materials, D. in due time filed his lien, but from an error in the description of the land it created no charge. Seven days after, but within the ninety days, the clerk, at the instance of D., corrected the lien by inserting the true description, swore D. to it, and indorsed thereon what he had done in the premises. *Held* a valid lien from and after the correction, though the action of the clerk was "somewhat irregular."—*Charles v. Sharlow*, 100.

Subcontractors—Notice.

2. Under section 556, C. C. Pro., as amended by chapter 94, Laws 1881, providing that every subcontractor desiring to avail himself of a mechanic's lien shall give notice to the owner, etc., "before or at the time" he furnishes any material, of his intention to furnish the same, the notice is a prerequisite to the establishment of a valid lien.—*McMillan v. Phillips*, 234.

Personal Judgment—Privity of Contract.

3. In such case, where it appeared the subcontractor commenced to furnish the materials for which he claimed a lien about a month before giving notice to the owner, *held*, the lien was invalid, and, there being no privity of contract, he was not entitled to a personal judgment against the owner.—*Id.*

MILLS.

See *Water and Water-Courses*.

MINES AND MINING.

Property before Patent.

1. Where all of the laws, rules, regulations, and customs with reference to a mining claim have been complied with, a property right, prior to the issuance of the patent, has been acquired that can be transferred or inherited.—*Suessenbach v. First Nat. Bank*, 477.

Trust.

2. Where the appellants, grantees of such a claim, (their grant being subject to that of respondent's as to a part, of which it or its grantors had held continuous possession,) acquired a patent to the entire claim, founded on the original location, there being no adverse claim by respondent, *held*, the appellants took the respondent's interest, charged with a trust that the court would enforce in an action brought by appellants to recover possession of the part held by the respondent.—*Id.*

Adverse Claim.

3. Respondent's interest was not such an adverse claim, within the meaning of sections 2325, 2326, Rev. St. U. S., as would require a protest of the appellants' application for a patent.—*Id.*

MORTGAGES.

See *Chattel Mortgages*.

Effect of covenants in, see *Married Women*.

MUNICIPAL CORPORATIONS.**Contract without Ordinance.**

1. Where a city had the power to construct a system of water-works, it was not necessary that its council, before entering into a contract with reference to it, should have passed an ordinance authorizing the works to be constructed, or the contract to be made, when the charter did not require it.—*National Tube Water-Works Co. v. City of Chamberlain*, 54.

Liability—Ratification.

2. Though a contract made by a city should have been preceded by an ordinance, still, where the city retains the benefit, it will not be permitted to object that it was not empowered to make the contract simply because the manner of entering into it was not strictly in accordance with the mode prescribed by the charter, where it was not *ultra vires*.—*Id.*

3. Although there may be a defect of power in a corporation to make a contract, yet, if one made by it is not in violation of its charter, or any statute prohibiting it, and the corporation has induced a party to expend money or perform his part, the corporation is liable on it.—*Id.*

NEGLIGENCE.

See *Railroad Companies; Master and Servant*.

NEGOTIABLE INSTRUMENTS.

Parol to vary indorsement, see *Evidence*, 1.

NEW TRIAL.

See, also, *Appeal*.

While the mere omission to instruct on a given proposition, there being no request therefor, is not error, still, if the appellate court can see the jury was misled by the instructions given, it will grant a new trial.—*Fielke v. Chicago, M. & St. P. Ry. Co.*, 444.

OFFICE AND OFFICER.

Sufficiency of complaint against treasurer, see *Pleading*, 1, 2.

Vacancy.

1. M. having been re-elected county treasurer and declined to qualify, (having also waived his statutory time for that purpose,) *held*, under Pol. C. c. 5, § 11, providing that there shall be a vacancy on the failure of a per-

son elected to qualify, that a vacancy occurred which it was the duty of the board of county commissioners to fill; and after this was done, under section 14, providing that an officer going out of office shall deliver to his successor all public moneys, etc., it was M.'s duty to at once deliver to his successor such money, etc., without demand.—*Stutsman County v. Mansfield*, 78.

Changing Salary of District Attorney during Term.

2. During the term previous to P.'s acting as district attorney the salary had been \$1,200 per annum, fixed at the beginning of that term. The statute (Laws 1886, p. 83) provided that the district attorneys shall receive such salary as the board of county commissioners of their respective counties shall allow, but the salary "shall not be diminished during the term for which they shall be elected." On the day P.'s term began, an hour or more after he had qualified, the commissioners fixed the salary at \$700 per annum. *Held* it was in violation of the statute, and that P. was entitled to compensation at the rate of \$1,200 per annum.—*Polk v. Minnehaha County*, 129.

PAYMENT.

Application of, see *Taxation*, 2.

PLEADING.

Complaint in stock-killing cases, see *Railroad Companies*, 4.

Construction of Complaint on Objection to Evidence.

1. When it is objected to evidence at the trial that the complaint does not state facts sufficient to constitute a cause of action, a greater latitude of presumption may be indulged to sustain it, than when the same objection is made by demurrer.—*Stutsman County v. Mansfield*, 78.

Complaint on Treasurer's Bond—Sufficiency.

2. A bond given by M. was "conditioned for the faithful and impartial discharge of the duties of the office of county treasurer, and a true and correct accounting for all moneys, credits, accounts, and property which should come into his hands, and a delivery of the same over according to law," etc. The complaint, in an action upon the bond, after averring non-performance of each of the conditions, alleged that M. did not pay over the balances in his hands to the territorial, county, and school-district officers upon receiving proper vouchers; that from taxes and other sources, as such treasurer, he had received \$9,232.84, over and above all moneys legally paid out; that the board of county commissioners had directed him to settle with them; that he neglected and refused so to do; that he had presented a statement showing the above balance, which he failed to account for or produce; that demand therefor had been made; that, having failed to pay said balance, the board directed suit to be instituted against him and his sureties; that afterwards the said board removed him from office, declared the same vacant, and appointed one W. to fill the vacancy thereby created. *Held*, that the complaint was good on an objection to evidence, that it did not state facts sufficient to constitute a cause of action under the rule applicable when the objection is raised in that form.—*Id.*

Duty of Treasurer.

3. This complaint, under Pol. C. c. 21, § 95, requiring the treasurer to settle his accounts with the board of county commissioners when directed by them, and under chapter 5, § 14, requiring him, on going out of office, to turn over to his successor all public moneys, etc., was good as to the allegations in these respects, and therefore warranted the overruling of the objection.—*Id.*

PRACTICE.

On appeal, see *Appeal*, 9-14; *Certiorari*; *Jury*; *New Trial*; *Pleading*; *Trial*; *Venue*.

PRINCIPAL AND AGENT.

Ratification of Tort—Knowledge Requisite.

One cannot be held liable for the fraudulent representations of an unauthorized agent by accepting the benefits without knowledge of the representations. In such case, where the court charged the jury if the principal accepted the benefits he was liable for the representations, *held error*.—*Nichols v. Bruns*, 28.

PUBLIC LANDS.

Pre-emptioner's Rights before Patent.

1. A pre-emptioner of public land, with the usual final receipt, has no such title, prior to the issuance of the patent, as will enable him to maintain an action to quiet title to the land.—*Vantongerren v. Heffernan*, 180.

Jurisdiction of Courts Prior to the Patent.

2. Under the pre-emption laws of the general government the courts have no jurisdiction, until after the patent has been issued, to pass upon conflicting claims, arising between private parties, involving title to public land.—*Id.*

QUIETING TITLE.

See *Public Lands*, 1.

RAILROAD COMPANIES.

See, also, *Master and Servant*; *Trial*.

Liabilities for Surface Water.

1. In an action against a railroad company for overflowing land with surface water through alleged negligence in the construction of its road, it appeared that plaintiff, prior to the construction of the road, for a valuable consideration, had granted to the company the right of way over the premises for railroad purposes; that it had constructed the road in the usual and ordinary way under the circumstances, and with ordinary skill and precaution. *Held*, that the plaintiff had no right of action.—*Hannaher v. St. P., M. & M. R. Co.*, 1.

Killing Stock.

2. In an action against a railroad company for killing stock, proof of the killing, under section 679, C. C. Pro., providing that the killing shall be *prima facie* evidence of negligence of the company, the plaintiff need not prove more than the killing, but where the defendant, by its servants in charge of the train, shows that there was no negligence or want of ordinary care and skill, the *prima facie* case is overcome, and it devolves upon the plaintiff to affirmatively show that the defendant was guilty of gross negligence, or he cannot recover.—*Volkman v. Chicago, St. P., M. & O. Ry. Co.*, 69.

3. In an action against a railroad company for killing stock, the question as to when the *prima facie* case, under section 679, (providing that the kill-

ing shall be *prima facie* evidence of negligence of the company,) is overcome, is one of law for the court, and not of fact for the jury.—Id.

4. In an action against a railroad company for killing stock, it is not necessary to allege a compliance with section 680, C. C. Pro., providing for an appraisal of stock killed or injured. The provision is merely cumulative or permissive in its character, and a compliance with it is not a prerequisite to the institution of a suit.—Id.

5. In an action against a railroad company to recover the value of a heifer killed upon the track, it appeared she was at large unattended, and came upon the track at a point where she could not have been seen by the men in charge of the engine in time to have averted the accident; that after she was seen everything possible was done to prevent the injury. *Held*, the evidence was insufficient to support a verdict in favor of the plaintiff.—*Gay v. Fremont, E. & M. V. Ry.*, 514.

Fires.

6. On an issue of gross negligence, in an action for the loss by fire of certain goods in the warehouse of a railroad company, where it appeared the fire was caused by some burning packing that had been taken out of a "hot box" by train-men, and left a foot or two from a raised platform that extended to the warehouse, and it also appeared at the time that there was a strong wind blowing in the direction of the house from where the packing was, *held* permissible to show that there were combustible materials around and under the platform near where the packing was left.—*Whiting v. Chicago, M. & St. P. Ry. Co.* 90.

7. In an action against a railroad company for the value of certain goods burnt in its warehouse through alleged gross negligence, it appeared that train-men, at night, had taken burning packing out of a "hot box," and left it within two or three feet of a raised platform that extended to the warehouse; that under the platform, near the packing, were weeds, paper, and other combustible materials; that at the time a strong wind was blowing in the direction of the warehouse from where it had been placed, and in about thirty minutes after a fire was discovered in that part of the platform where it had been left. *Held* a case for the jury.—Id.

8. In an action against a railroad company for damages caused by a fire seen for the first time in the afternoon, on an issue of its connection with one claimed to have been negligently set out in the morning, the court said to the jury: "Unless you find the fire in the morning has a connection with the afternoon fire, the plaintiff expects a verdict for the defendant;" and this being the only reference in the charge to the proximate cause of the injury, *held* misleading, and susceptible of an erroneous construction.—*Pielke v. Chicago, M. & St. P. Ry. Co.*, 444.

9. Where the evidence was that a fire set out through alleged negligence in the morning was believed to have been extinguished, and it appeared the damage was done by a fire seen for the first time in the afternoon, a strong wind having arisen in the mean time, and with its aid the latter fire spread rapidly in the direction of the plaintiff's property; and the only evidence of connection between the two fires was mere opinion, and the circumstances were that it was as reasonable to suppose the extension of the afternoon fire to that of the morning as the one of the morning to the afternoon, the appellate court was inclined to hold that the morning fire was not the proximate cause of the injury; but *held*, if the case were submitted to the jury, it ought to have been done under such instructions as would have given them clearly to understand that they were to determine whether or not the morning fire was the direct and proximate cause of the injury.—Id.

Injuries to Passengers.

10. In an action for damages against a railroad company for personal injuries caused by the derailment of a car from a broken rail, the court admitted evidence of the condition of the land and track, without confining it to the time and exact place of the accident. *Held* error.—*Pattee v. Chicago, M. & St. P. Ry. Co.*, 267.

11. In an action for damages against a railroad company for personal injuries caused by the derailment of a car, the court instructed the jury "that

experience proves that when the track and machinery are in perfect condition, and prudently operated, the trains will keep upon the track, and run thereon with entire safety to those on the cars.

"Whenever a car leaves the track, and goes down an embankment, as this car did, it proves that either the track or machinery, or some portion thereof, is not in proper condition, or that the machinery is not properly operated." *Held* error, as, taken together, it in effect affirms that the happening of such an accident is conclusive, instead of *prima facie*, proof of negligence.

The use of the term "perfect" in such connection is objectionable, as it is liable to cause the jury to think that the law exacts of railway corporations the duty of furnishing something better than a reasonably good track for the transportation of passengers.—*Id.*

Personal Injuries on Track.

12. In an action against a railroad company for causing the death of plaintiff's decedent by crushing him between cars at or near a crossing, it appeared the track on which the accident occurred was used to stand cars on; that it was not a public crossing, but its use had been acquiesced in by the company, and the cars were usually separated at that point. On this occasion they were two or three feet apart, and, as the decedent approached the opening, a train at the other end of the cars was backing towards it at the rate of two or three miles an hour, and as he got on the track he was caught, and the injuries inflicted. There was nothing to prevent the approaching train being seen and heard by the decedent, who it appeared was in full possession of his faculties. *Held*, that even though the company's servants were negligent in not observing the opening and decedent's approach, and also in their omission to ring the bell and blow the whistle, still the decedent was guilty of such contributory negligence as would prevent a recovery.—*Berleson v. Chicago, M. & St. P. Ry. Co.*, 318.

RAPE.

Assault with Intent to—Indictment—Sufficiency.

1. An indictment for assault with intent to rape, charging that K., in and upon one M., did make an assault, and her, the said M., did then and there beat and ill-treat, with the intent to commit the crime of rape upon her, the said M., she, the said M., then being a female under the age of 10 years, *held* sufficient.—*Territory v. Keyes*, 244.

2. In the case of an indictment for an assault with intent to rape a child under the age of consent, it is not necessary to allege that it was done without her consent, and in such case, the assault being charged, force is implied.—*Id.*

Sufficiency of Evidence.

3. On the trial of an indictment for an assault with intent to rape a child of tender years, it appeared to have been done at the house of the defendant, when they were alone; that all of the facts relating to it were testified to by her; that she was corroborated by a statement of the occurrence made immediately thereafter to the mother, who saw her coming from the house; this being all of the testimony as to the offense, (the defendant not testifying,) and the same having been submitted to the jury on a proper charge, *held*, the court would not disturb the verdict.—*Id.*

Consent, when Immaterial.

4. In the case of an assault with intent to rape a child under the age of consent, evidence as to consent is immaterial.—*Id.*

Impotency.

5. Impotency is no defense to an assault with intent to commit a rape.—*Id.*

Instructions.

6. The court charged the jury: "Should this court make errors, it will not only be ready this to correct, but there stands a higher court above that will protect the rights of the defendant." *Held* not error.—*Id.*

RATIFICATION.

See *Principal and Agent*.

REGISTRATION.

See *Voters and Elections*.

REPLEVIN.

See *Chattel Mortgages*, 1, 2.

RESIDENCE.**Sufficiency of Facts to Constitute.**

1. Plaintiff claiming for his children the school privileges due a resident of a certain city, it appeared that prior to the fall of 1885, he resided with his family on a fully-equipped farm, owned by him, about 20 miles from the city; that each fall he took his family to the city, rented a house, sent his children to school during the winter, gave up the house in the spring, and returned with them to the farm; that a hired man remained on the farm, and took care of the stock during their absence; that farm-house furniture and other property were used in the city, and taken back in the spring; that he had no permanent business in the city during the winter; his reason for bringing the children in was that on the farm in the winter they were deprived of social and school advantages; that in the fall of 1886, he was a town officer where the farm was situated, and voted there at that time, but in the spring of 1887, he voted in the city; that he and his family would probably return to the farm in the spring of 1888, if he continued to own it; but that he is now, January, 1888, in the city with his family, and claims it as his residence. *Held* not a resident of the city, and not entitled to the privileges claimed.—*Gardner v. Board of Education*, 259.

Choice.

2. In determining the true residence, choice is an element to be considered, but it is inferior in weight to tangible acts indicating residence.—*Id.*

SPECIFIC PERFORMANCE.**Contract—Certainty.**

1. P., in consideration of a conveyance of land at a certain figure, on which to plat a town, agreed to plat the same and reconvey to the owner a block of average size to include the land on which his dwelling stood. After the town had been platted this block was fractional. *Held*, the agreement was too indefinite and uncertain to be specifically enforced.—*Hollenbeck v. Prior*, 208.

Part Performance.

2. In an action for specific performance of a contract, a party cannot predicate part performance upon being in possession of the land, when the possession was not induced by the contract.—*Id.*

STATUTES.

See, also, *Code Citations; Constitutional Law*.

Enactment—Verity of Official Certificates.

1. Where the certificate of the presiding officer of each house shows that the act was regularly passed, and it was in proper time approved by the

governor, and there is no affirmative record that it did not secure the concurrence of both houses, the court cannot say the certificates of these officers do not import verity.—*Territory v. O'Connor*, 397.

Statutes—Construction—Operation.

2. Chapter 70, Laws 1887, known as the "Local Option Law," is operative in any city of a county adopting its provisions, notwithstanding such city by its charter had the exclusive power to license and regulate the sale of intoxicating liquors, and such power is recognized, and not permitted to be interfered with by chapter 72, Laws of the same session; this chapter, however, being enacted prior to the "Local Option Law," and consisting in an amendment merely to chapter 26, Laws 1879, the general statute authorizing boards of county commissioners to collect licenses for the sale of intoxicating liquors.—*Minnehaha Co. v. Champion*, 433.

STATUTES OF FRAUDS.

Performance within a Year.

1. An oral agreement made June 5, 1883, whereby D. contracted to furnish S. lumber and other materials as he might need them to construct four buildings, three to be erected during the season of 1883, and the fourth during the season of 1884, was one, from its terms, that was capable or possible of being performed within a year, and not, therefore, invalid under section 920, subd. 1, C. C., requiring contracts not to be performed within a year to be in writing, or that there should be some note or memorandum thereof.—*Sarles v. Sharlow*, 100.

Construction—Subdivision 1, § 920, C. C.

2. Subdivision 1, § 920, C. C., making an agreement that by its terms is not to be performed within a year invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party to be charged, is substantially a re-enactment of the statute of Car. II. on the same subject, and under it, to hold an agreement void, it must be incapable of performance within a year.—*Id.*

TAXATION.

Equalization of taxes, see *Appeal*, 1, 2.

Railroads—Gross Earnings—Statute—Constitutionality.

1. Chapter 99, Laws 1883, requiring railroad companies to pay a certain per cent. of all of their gross earnings in lieu of other taxes, is unconstitutional in so far as it taxes interstate commerce; that is, earnings beginning without, or terminating without, the territory.—*Northern Pac. R. R. Co. v. Raymond*, 358.

Payment—Application.

2. Section 1, c. 99, Laws 1883, provided that railroad companies, in lieu of other taxes, shall pay to the territorial treasurer a certain per cent. of all of their gross earnings, payable, "one-half on or before the 15th day of February, and one-half on or before the 15th day of August, in each year." On account of taxes for the year in controversy, the respondent, on the 5th of March, paid appellant a sum equal to more than three times the taxes due (or that could be constitutionally collected) for that year. *Held*, in an action to restrain the treasurer from selling property for the August installment, that the March payment operated to discharge the taxes for that year.—*Id.*

TIME.

Computation.

1. By an act of congress, 18 U. S. St. 420, under which a patent issued to an Indian, on the 15th day of June, 1880, it was declared the land should be

inalienable for "five years from the date of the patent." *Held*, in computing the time, that the first day should be included, and that a conveyance made on the 15th of June, 1885, was not within the limitation, and therefore valid.—*Taylor v. Brown*, 385.

Construction—Rule as to First Day.

2. In such cases there is no absolute rule of computation. "From" in its literal and restricted sense, means "exclusive," but it may be used in a connection that means "inclusive;" and to prevent forfeitures, uphold *bona fide* transactions, and carry out the intention of parties, courts will always regard it as so used.—*Id.*

TREASURER.

See *Office and Officer.*

TRIAL.

See, also, *Master and Servant; Railroad Companies; Rape; Water and Water-Courses.*

Instructions—Invading Province of Jury.

1. In an action against a railroad company for damages in overflowing land with surface water through alleged negligence in the construction of its road, where the plaintiff, for a valuable consideration, had granted the company the right of way over the premises, the court instructed the jury a recovery could not be had for ordinary damages, but the damage caused, if any, by the discharge of large and unusual quantities of waters from other lands, if such occurred, would not be ordinary damage. *Held* error in determining by the court what is ordinary damage, and giving the jury to infer that, while the company might not be liable for ordinary, it would be for extraordinary, damage caused by the construction of the road over the premises.—*Hannaher v. St. Paul, M. & M. R. Co.*, 1.

Findings—Omission of Judge's Signature.

2. Where the judge omitted to sign the findings of fact and conclusions of law, but the record shows they are made a part of the judgment roll, referred to in the judgment, and are preceded by the declaration of the judge, "In this action, tried before the court, I make and file the following findings of fact and conclusions of law," and, following this one record to the end, it is found who made them, by seeing the signature of the judge, *held* he did make and file findings of fact and conclusions of law.—*National Tube Water-Works Co. v. City of Chamberlain*, 54.

Pleading—Proof—Question for Court.

3. To entitle a party to have his case submitted to the jury because of a conflict in the evidence, he must first have established a *prima facie* right of recovery in a proper action.—*Knapp v. Sioux Falls Nat. Bank*, 278.

Instructions.

4. It is error for the court in its charge to call attention to assumed facts of which there is no proof.—*Id.*

Prima Facie Case—Question for Court—Conflict of Evidence.

5. To entitle a party to have his case submitted to the jury because of a conflict in the evidence, he must first have established a *prima facie* right of recovery in a proper action.—*Knapp v. Sioux Falls Nat. Bank*, 278.

Rule as to Submitting Case to Jury.

6. In every case before the evidence is left to the jury, there is a preliminary question for the court, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict in favor of the party producing it on whom is the burden of proof.—*Id.*

TROVER AND CONVERSION.

Conversion of Chattel Mortgage Property, What Constitutes.

1. C., having executed to plaintiff a chattel mortgage on certain growing wheat, deposited it, (after harvest, and before the maturity of the mortgage) in the defendant's elevator, where it was mingled with other wheat belonging to various parties; C. receiving, according to custom, "warehouse" receipts therefor. These he afterwards sold. Upon their presentation defendant shipped out of the territory to their owner the amount of wheat called for by them. *Held*, the defendant was liable to the plaintiff, whose mortgage had been duly registered, for the value of the wheat.—*Best Brewing Co. v. Pillsbury & H. Elevator Co.*, 62.

Evidence.

2. The defendant bank accepted a deposit of money from the plaintiff with instructions to pay it out in satisfaction of a certain mortgage on her lands. On an issue of a compliance with these instructions, the fact of whether or not she had since paid off the mortgage, there being no allegation in the complaint of a conversion of the satisfaction piece, is immaterial.—*Knapp v. Sioux Falls Nat. Bank*, 378.

Forgery—Sufficiency of Evidence—Question for Court.

3. In such a case where the plaintiff claimed that the evidence tended to show that the satisfaction piece taken by the bank was a forgery, and the evidence thereof consisted of admissions to that effect by the cashier and attorney of the bank, *held* not sufficient to warrant the submission of the question to the jury.—*Id.*

TRUSTS.

Constructive, see *Mines and Mining*, 2.

VENUE.

Order on change of, appealable, see *Appeal*, 7, 8.

Foreclosure Proceedings.

1. Section 92, C. C. Pro., requiring an action to foreclose a mortgage on real property to be brought in the county where the land is situated, is so qualified by section 95, providing that if the county named in the complaint be not the proper one, it may be tried therein, unless the defendant, before the time for answering expires, demands in writing that the trial be had in the proper county, that a district court, on default, has jurisdiction to render a decree foreclosing a mortgage on land situated in another county and district from that in which the action was brought, and *mandamus* will issue requiring such court to take cognizance of the case, on its refusal to do so.—*Territory v. Judge, &c.*, 275.

Sufficiency.

2. Where, from an examination of the affidavits on an application for a change of venue, the appellate court cannot say there was an abuse of discretion in denying the motion, the fact that the trial court 18 months before, on the same showing, granted a change in one of a class of cases, (the same application being made in all, and still pending,) would have but little influence with the appellate court in considering the denial of this, as the trial judge may have found the lapse of time obviated the necessity of a change in this case.—*White v. Chicago, M. & St. P. Ry. Co.*, 508.

VERDICT.

See *Appeal*, 17; *Trial*.

VOTERS AND ELECTIONS.

Registration—Qualifications of voters.

1. Section 47, c. 27, Pol. C., after prescribing certain qualifications, provides that all persons who "shall have complied with the provisions of any law which is now, or may in the future be, in force relating to the registration of voters, shall be entitled to vote." After this there was a law passed with reference to registration, (Laws 1881, c. 122,) whereby, to be entitled to vote, the elector must have been registered, or must qualify, at the time of offering his vote, by furnishing the judges with his affidavit, stating certain facts showing him to be a legal voter, etc. *Held*, that the requirements of the act of 1881 were not mere regulations, but qualifications that the elector must have met before being entitled to vote; and an election to change the county-seat, where there had been no registration, or qualification of voters by affidavit, as required by said act, (on contest for that purpose,) *held* void.—*Farren v. Commissioners of Buffalo Co.*, 36.

2. The registration act 1881, c. 122, § 15, applies to counties bordering on the Missouri river, etc. The act 1873, c. 16, § 26, bounds Buffalo county by the Missouri river, but that part is an Indian reservation. *Held*, that the act applied to Buffalo county.—*Id.*

WATERS AND WATER-COURSES.

Liability for surface water, see *Railroad Companies*, 1.

Evidence—Apparent and Efficient Head.

1. In an action for damages in exceeding a right to construct a dam for a water-power of a certain number of feet head, where the difference at the trial was the method to be employed in measuring the number of feet head, the distinction between the general or apparent and the efficient head of water-power is immaterial; it appearing no such distinction was known or recognized at the time of the grant between the parties.—*Langness v. Pettigrew*, 45.

Special Finding—Instructions.

2. In an action for overflowing lands in excess of a grant to construct a "dam to be for a water-power of eight feet head," where the difference at the trial was the method of measuring the number of feet head,—whether it was by taking the difference between the water level above the dam and that below in the tail-race under the wheel, when the water was quiet, and the mill not in operation, or when it was running,—the question for a special finding: "At an ordinary stage of water, was there more than eight feet difference between the level of the water in the pond above the mill-wheel and the level of the water below the mill-wheel in the race, while the mill is in operation?"—is proper and material. It did not have the effect of instructing the jury to ascertain the number of feet head by one method, when the court in its charge called attention to both, and told them they were to ascertain the proper one from the evidence before them.—*Id.*

3. In an action for damages in having exceeded a right to construct a "dam * * * eight feet high from a certain rock at the edge of the river where the dam crosses," it was proper to submit to the jury, for a special finding of fact, the question: "Was the dam erected more than eight feet high from the point of the rock designated in the deed?" It did not inform them "the point of the rock" from which to make the measurement, though none was named in the deed.—*Id.*

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